No. 210

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

RAPID ROLLER CO., A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CASES

STATUTES AND MISCELLANEOUS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Rapid Roller Co., your petitioner, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, approving, with a single modification, an order of the National Labor Relations Board, and a decree by that court enforcing compliance with the requirements of that order.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (4 R. 2035-2050) is reported in 126 F. 2d 452. The findings of fact, conclusions of law, and order of the National Labor Relations Board (1 R. 216-274) are reported in 33 N. L. R. B. No. 108.

JURISDICTION

The opinion of the Circuit Court of Appeals was filed, and its original judgment of approval with modification entered, February 2, 1942 (4 R. 2034, 2051). Petition for rehearing was denied April 9, 1942 (4 R. 2051-2052). The decree of the Circuit Court of Appeals, enforcing compliance with the Board order, was entered on May 8, 1942 (4 R. 2070). The jurisdiction of this Court is invoked under under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and under § 10(e) of the National Labor Relations Act.

QUESTIONS PRESENTED

The following questions are presented for consideration in connection with this petition for writ of certiorari:

(1) Has petitioner been accorded its right to a fair hearing and due process of law where the Circuit Court of Appeals, upon petitions for review and enforcement of an order of the National Labor Relations Board, (a) admittedly looked "only to the evidence that is favorable to the Board" and (b) ignored undisputed facts requiring a different result?

(2) Does § 2(3) of the Act alone operate to extend or create a contract of employment so as to authorize the Board to order reinstatement of strikers, and back pay, for a period wholly subsequent to the termination of the employer-employee status under the express terms of the written contract of employment between the parties?

(3) Is the Board authorized to find that an employer has refused to bargain collectively, and to predicate thereon an order of reinstatement and back pay, where it is admitted that the employer (a) has entered into successive collective agreements with its employees, (b) has conducted constant negotiations respecting plant transfers and hiring notwithstanding there was

no closed shop agreement, (c) has acceded to two Union complaints respecting specific instances of plant transfers, but (d) while intensively negotiating respecting a third complaint, refused to accede to the Union demands for the discharge of four newly hired employees and one old employee?

(4) Upon reviewing a back pay order of the Board and in remanding the case with instructions to make due allowances for the unjustified refusal of employees to take desirable new employment, is a Circuit Court of Appeals authorized (a) to direct how and upon what theories the matter is to be determined by the Board and (b) to place the burden of proceeding and proof upon the employer—despite the holding of this Court that the matter is peculiarly one for the original discretion and initiative of the Board?

(5) Is the Board authorized to order back pay for strikers for a period prior to an offer by them to return to their positions?

The following questions are presented for brief and argument on the merits in case the writ is granted:

(6) Can a finding by the Board of interference, restraint, and coercion in violation of § 8(1) of the Act be sustained as a matter of law where the undisputed facts are that (a) the plant was promptly and completely unionized, (b) the employer immediately and constantly recognized the Union as the exclusive bargaining agent for its employees, (c) every employee eligible to membership in the Union had exercised and enjoyed every right guaranteed by § 7 of the Act, and (d) statements attributed to the employer at no time had any coercive effect upon the employees?

(7) Was the Board authorized to make the blanket provision of Paragraph 1(c) of its order prohibiting any violation of the statute?

(8) Was the Board authorized to find discriminatory discharge, and to make an order for reinstatement or

back pay, with respect to two employees (a) who were not members of the Union or eligible for membership therein and had, in fact, by the Union itself been denied transfer to a unionized position and (b) whose discharge after a strike began was occasioned solely because the men to whom they were assistants had been transferred to other positions leaving nothing for those two employees to do except take positions vacated by strikers which they declined?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, July 5, 1935, 49 Stat. 449, 29 U. S. C. sec. 151, *et seq.*, are—

* * * * * * *

Definitions.

Sec. 2. When used in this Act—

* * * * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * * * *

Rights of Employees.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * * * *

STATEMENT

This proceeding involves an order of the National Labor Relations Board directing the reinstatement of strikers, with back pay over a period of more than three years and aggregating several hundred thousand dollars. The plant had long been unionized; the employer had recognized the

Union as the exclusive bargaining agent for the employees; and successive annual collective agreements had been entered between employer and employees. Under its interpretation of the then current contract, the Union thereafter claimed a right to veto the hiring of new men; the employer refused to accede to the Union's demands in this respect; and a strike followed. The Board found that the employer had not approached negotiations over the Union's interpretation with an "open mind" and predicated thereon its order for reinstatement and back pay. The facts are as follows:

Petitioner, Rapid Roller Co., is an Illinois corporation organized in 1920 (2 R. 845). In its plant, in Chicago, it manufactures and services rollers for printing presses and produces rubber "blankets" for use in lithograph and off-set printing (2 R. 845-847). Prior to 1937 its employees were not members of any labor organization, but in April of that year they organized Local No. 120 of the United Rubber Workers of America, affiliated with the C. I. O. (3 R. 1434). Until the immediate dispute here involved began in March 1939, every production worker in the plant was a member of the Union (2 R. 870-871, 944; 3 R. 1198-1199; 4 R. 1891). The plant, in the words of the Union president, was "one hundred per cent organized" (4 R. 1891).[1]

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[1] Until just before the strike, petitioner had in its employ 89 production workers, all of whom belonged to Local 120. Thirteen of these were in the machine shop, 13 in the blanket department, 39 in the mercury department (a department in which rubber coverings were made and attached to cores of printing press rollers), 17 in the composition department (a department in which a composition covering was made and attached to the cores of printing press rollers), and 7 were janitors, watchmen, firemen, and shipping room employees (1 R. 95-97; 4 R. 1898-1900). The Union did not admit to membership the laboratory employees, the truck drivers, the salesmen, or the general office staff (1 R. 100-101).

Immediately upon the organization of the Union in April 1937, the employer recognized it as the bargaining agent of all the production employees, negotiated with it, and entered into a written agreement with it for the period of one year (1 R. 100, 301-302; 2 R. 690-691, 943-946; 4 R. 1802-1805).

In the early part of 1938 the previously experimental "blanket" department first became commercially profitable (2 R. 852, 938, 1036; 3 R. 1462).[2] Ability to perform skilled work, including capacity to handle sensitive machinery, were required of employees in that department.[3] The subsequent differences between the employees and employer involved the matter of transfers to, or hiring in, that growing department:

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[2] In 1938 and 1939 there were only 13 employees in the blanket department (1 R. 97). The only men who understood the manufacture of these rubber blankets were those 13 men, a foreman, a scientific man in petitioner's laboratory, and a few graduates of the blanket department who were then serving as salesmen and office men (3 R. 1216, 1230, 1307).

[3] The blanket department was a new and expanding branch of petitioner's business. Its product was wholly unlike those of its other departments. The rubber "blankets" were made by applying 180 to 220 separate spreads of thin layers of rubber to a basic special cotton fabric (2 R. 846-847, 963, 968; 3 R. 1073-1074). The many thin layers of rubber aggregated in thickness only twenty-one thousandths of an inch (2 R. 963). The blanket so produced was different from any other (2 R. 938). Unusual and sensitive machinery was used in the manufacture of the blankets (2 R. 966). The rubber blanket makers had to read micrometers and gauges and make very particular settings on their machines (3 R. 1108). The blankets, made in huge pieces 30 to 40 yards in length (2 R. 963; 3 R. 1218), were very expensive, each costing several hundred dollars (2 R. 964). By reason of the precision and delicacy of the manufacturing operation, it was very easy to ruin a blanket; a variation of one and one-half thousandths of an inch in thickness of any part of the blanket necessitated the rejection of all of it (2 R. 963), thereby causing a substantial loss to the manufacturer. Workers in the blanket department had to go through a period of special training (3 R. 1110, 1108, 1123, 1241, 1242, 1230; 2 R. 852).

In April 1938 the Company transferred a Union man, one Meskan, from the machine shop to be a spreader's helper in the blanket department. Thereupon Moore, the Union's shop committeeman for the latter department, objected and insisted that the position be given to Moore's brother who is described in the 1937 contract with the Union as a colored janitor (4 R. 1806). Although the contract then in effect contained no seniority provision (1 R. 230 note 12; 4 R. 1802-1806), Moore insisted that his brother have the position because of departmental seniority and threatened to close the plant by a strike otherwise (1 R. 446; 3 R. 1065-1069, 1179). The Company's president, Rapport, a man of diminutive size (3 R. 1457), then went to the blanket department and had a heated argument with Moore (1 R. 446; 2 R. 948; 3 R. 1068). Moore told Rapport that he would "wring [the latter's] fat neck" (1 R. 232). Rapport, according to Moore's testimony, had picked up a "crank handle" and used it threateningly (1 R. 444); and he ordered Moore discharged (1 R. 232). Although the Union contract provided that "there will be no strike, stoppage or lockout during the period of this agreement pending the settlement of any disputes" (4 R. 1805), Moore promptly persuaded the men in the blanket department to engage in a sitdown strike (1 R. 446-447; 2 R. 948-949). Rapport immediately reinstated Moore, gave the disputed job to Moore's brother, and the strike ceased (1 R. 446-447; 3 R. 1068-1069). The court below mentions the "crank handle" aspect of that incident three times and lays chief reliance upon it to sustain the Board's order herein (4 R. 2039, 2041, 2046), but the Board held that there had been no refusal to bargain in that instance (1 R. 233).

In the same month as the Meskan affair, April 1938, the Union contract was to expire; and, after negotiations ex-

tending over a period of about ten days, a new contract was agreed to and signed (1 R. 91-97, 305, 450, 451; 3 R. 1336).[4] The contract—which named every production worker, defined his job, and stated his weekly wage for the term—was to be in force for one year after April 23, 1938 (1 R. 94-97). The Union had endeavored to secure a closed shop provision (4 R. 1815, 1817), but finally consented to its elimination (1 R. 517-518; 2 R. 636-639, 851-854, 869-874; 3 R. 1326-1340). The Company acceded to a seniority clause for promotions, better terms as to hours and overtime, and an increase of minimum pay and general wages (2 R. 885, 874-878).

In September 1938 the Company transferred chemical laboratory assistant Levy to the blanket department (3 R. 1181-1182), but the shop committee objected on the ground that there were two or three production employees in other departments not then working (1 R. 312, 519, 643-644; 2 R. 957; 3 R. 1184). After the employer had called back to work those men who had been temporarily idle (2 R. 957-958; 3 R. 1183, 1226-1227; 4 R. 1963), the Union still objected to the transfer of Levy to the blanket department and instituted a second sitdown strike, this time throughout the whole plant, to which the Company yielded in a few hours (1 R. 311-315, 453-468, 518-522, 537-541; 2 R. 641-646, 955-961, 1032-1034; 3 R. 1180-1186).

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[4] Negotiations for the new contract for the year commencing April 23, 1938, opened on April 20 with submission of a draft by the Union to the Company and lasted for about ten days (1 R. 305, 451; 2 R. 849-850; 3 R. 1322; 4 R. 1814-1819). After discussion (2 R. 636-641, 850-865), submission of a counterdraft by the Company (2 R. 868-869; 4 R. 1935), a meeting in which further changes were suggested and discussed (2R. 868-880), and submission and discussion of a third draft on April 28, 1938, which was approved by the full membership of the Union (2 R. 880-885), the new contract (1 R. 91-97) was executed retroactively as of April 23, 1938 (1 R. 450; 3 R. 1336).

As to that incident, the Board again found no refusal to bargain (1 R. 237).[5]

In October 1938 the need for additional personnel in the growing blanket department became acute and Rapport, without success, attempted to work out an agreement regulating transfers from one department to another. He prepared a ten-point memorandum (1 R. 240; 4 R. 1806-1807) and submitted it to the shop committee for their reactions (2 R. 961). The committee found it unacceptable (4 R. 1807-1809); and the committee's counter proposals were unacceptable to the management because they insisted upon the Union grievance committee being given jurisdiction over the question whether the work of an employee transferred to the blanket department was satisfactory (2 R. 962-976; 4 R. 1808). The immediate negotiation was dropped after the employer made one further inquiry as to whether there was anything that could be done and received a negative answer (2 R. 967).

Later, in January 1939, the Company's foremen initiated and held a number of meetings with the shop committee in an attempt to agree on men to be transferred to the blanket department (1 R. 525; 3 R. 1101-1109). Beginners in the blanket department had to be specially trained (see note 3, *supra*) and had to start at the minimum plant wage of $25.00 per week (1 R. 94; 3 R. 1079-1080, 1110, 1123, 1242). Of petitioner's 89 employees, only 12 were earning as little as that minimum wage and most of these were doing the work of porters, janitors and common laborers (1 R. 95-97). The management believed them incapable of learning or performing the precise work of making costly lithograph blankets (2 R. 964, 966, 974; 3 R. 1107-

[5] At the time of the attempted transfer, Levy was not a member of the Union, being ineligible because he had not been a production employee (1 R. 100-101). A few months later the Union reversed its position and requested that he be transferred to the blanket department (1 R. 331-332, 477; 2 R. 977-978).

1108, 1241, 1105, 1121-1122). The committee at the request of the foremen submitted a list (1 R. 541; 4 R. 1809) but later withdrew some names (2 R. 656-657; 3 R. 1079, 1109, 1116-1117, 1138-1139). The foremen agreed to take immediately two of the men finally proposed by the Union, and they had no objection to two others, but the Union refused to agree unless others of greater seniority—whom the foremen considered unfit for the technical work of the department—were taken first (3 R. 1105-1106, 1117-1122, 1136, 1240-1242). The shop committee declined to negotiate further (3 R. 1122, 1124, 1136).

Thereupon, in February 1939, every worker in the plant being engaged full time (2 R. 972; 3 R. 1200), the Company hired four new men for the blanket department at the minimum plant wage (2 R. 839; 3 R. 1142-1150, 1187-1198; 4 R. 1581). It was that hiring and the strike which followed, fully described below in Point I(B) of the argument, which led to the Board proceedings here involved. The strike began on March 10, 1939 (1 R. 250). Pending negotiations in attempted settlement continued thereafter (1 R. 252), but the Union never withdrew from its position in any respect (1 R. 335-336; 2 R. 900, 904; 3 R. 1365-1367, 1374-1375, 1381-1382; 4 R. 1778, 1910-1911). The Union contract with the Company expired on April 23, 1939, which was forty-four days after the strike began (1 R. 91, 94). On and after April 23, 1939 (the date of the expiration of the contract) and before May 9, 1939 (the date of an alleged offer of the 84 strikers to return to work, which is discussed below in Point II(B) of the argument) the Company had secured a full complement of 93 men to work in the plant, including six strikers who had applied for and been given their old jobs (1 R. 119; 3 R. 1388; 4 R. 1901-1906).[6]

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[6] After the strike began, most of the laboratory employees went to work in the factory, since none of the ordinary operations of the

After the commencement of the strike, the Union filed with the Board its original charge dated June 8, 1939 (1 R. 33) and an amended charge dated November 30, 1939 (1 R. 36). The Board issued its complaint dated December 1, 1939 (1 R. 40) and the taking of testimony began on December 11, 1939 (1 R. 280). Oral argument was heard on October 1, 1940 (1 R. 215).

The Board found that petitioner had interfered with the employees' right to organize (1 R. 228, 233) and had refused to bargain collectively with respect to the hiring of the four men in March 1939 (1 R. 257). Board Member Leiserson, one of the two members of the Board who had heard the arguments, dissented from both findings (1 R. 273-274).[7] The order of the Board, entered July 19, 1941 (1 R. 273), directed the Company to cease and desist from (a) refusing to bargain collectively, (b) discouraging membership in the Union, or (c) in any manner interfering with the guarantees of § 7 of the Act. Affirmatively, it directed petitioner to (a) bargain collectively with the Union, (b) reinstate the strikers, (c) give them back pay from the date of an alleged offer by them to return to their posts,

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laboratory was continued; but Schnitzer and Levy, laboratory boys, declined to work in the factory in the place of strikers on the ground that it was against their principles to do so (2 R. 817, 822, 826) and remained in the laboratory doing nothing (2 R. 820-821, 827, 828; 3 R. 1223, 1225). Subsequently they made sample rollers, did control work, cleaned up the laboratory, and washed the windows (2 R. 820, 1203). Finally, on March 17, factory manager Schartz told Schnitzer that the company was not busy and did not need him any more (2 R. 821). On March 24, Levy was given an extra week's pay and was discharged for lack of work for him to do (2 R. 828, 1 R. 263). The Board has ordered the reinstatement of one and back pay for both (1 R. 260-265, 270, 272), and the court below has affirmed (4 R. 2047-2049, 2072). Its ruling on this detached phase of the case is specified as error (No. 8) and stated as one of the questions presented (No. 8) for brief and argument on the merits in case this petition is granted.

[7] Chairman Millis, who later became a member of the Board and had not heard the arguments (1 R. 215), participated in the final decision and thus cast the deciding vote with Board Member Smith (1 R. 273).

(d) reinstate one non-union non-production employee who had been discharged subsequent to the strike and (e) give the latter, and another in the same category, back pay, (f) post the usual notices, and (g) make the usual report of compliance within ten days (1 R. 270-273).

The court below sustained the order of the Board in all respects except that it remanded the cause for further proceedings as to deductions from back pay for the unjustified refusal of employees to take other suitable employment (4 R. 2035-2050), ordered compliance (4 R. 2051), and entered a decree accordingly (4 R. 2070-2073).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In depriving petitioner of the scope of judicial review required by the Fifth Amendment to the Constitution and provided by the Labor Relations Act, by refusing to consider any evidence—though admitted, indisputable, and controlling—except that deemed favorable to the Board's order;

(2) In approving and enforcing the Board's order directing, with respect to the strikers, reinstatement and back pay subsequent to the date of termination of employment expressly provided by the collective contract of employment entered into between the employer and the employees;

(3) In holding that there was any substantial evidence upon which the Board could lawfully (a) find petitioner guilty of a failure to bargain collectively and (b) order the reinstatement of the strikers with back pay;

(4) In prescribing by its judgment and decree of remand how and upon what theory the Board should determine deductions from back pay for the unjustified refusal

of strikers to accept other desirable employment; and in placing upon petitioner the burden of proceeding and proof with respect thereto;

(5) In failing to hold that the Board was not authorized to order back pay for strikers during the strike and prior to an offer by them to return to work; and in failing to hold that the Board did not have substantial evidence before it upon which it could lawfully find that the strikers had made an adequate offer to return to their jobs;

(6) In approving the Board's findings and enforcing its order respecting petitioner's alleged interference, restraint, and coercion of its employees in the exercise of their rights under § 7 of the Act;

(7) In enforcing the blanket provision in Paragraph 1(c) of the Board's order prohibiting any violation of the statute;

(8) In holding that the Board had before it substantial evidence (a) upon which it could find that the discharge of two non-union employees was discriminatory and tended to discourage Union membership and (b) upon which it could lawfully order reinstatement of one and back pay for both;

(9) In entering its judgment approving, and decree enforcing, the order of the Board.

Specifications numbered 6, 7, and 8 will be briefed and argued on the merits in case the writ is granted.

REASONS FOR GRANTING THE WRIT

In reviewing the order, the court below announced at the outset that it would "look only to the evidence that is favorable to the Board" (4 R. 2036). It literally followed that unprecedented formula, disregarding both admitted facts and controlling testimony of the Board's own witnesses.

Only by the arbitrary exclusion of undeniable and pertinent facts were the Board and the Circuit Court of Appeals able to reach a decision against petitioner, as will appear from the argument below.

Here each finding of the Board has been inferred despite admitted facts to the contrary or "in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist." *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-341. See to the same effect *Gunning* v. *Cooley*, 281 U. S. 90, 94. Petitioner was thus denied a fair hearing and deprived of due process of law.[8]

I. THE BOARD'S ORDER REQUIRING THE REINSTATEMENT OF STRIKERS WITH BACK PAY IS UNAUTHORIZED BY THE ACT BECAUSE THE CONTRACT OF EMPLOYMENT HAD TERMINATED THERETOFORE AND, IN ANY EVENT, THERE WAS NO REFUSAL TO BARGAIN UPON WHICH SUCH AN ORDER COULD BE PREDICATED.

The reinstatement and back-pay provisions of the order of the Board (1 R. 266-268, 271-272) and of the decree of the court below (4 R. 2049, 2072) are unwarranted for two

[8] The rule of review adopted by the court below deprived petitioner of all opportunity for a defense—of what Mr. Justice Brandeis has called "due process in the primary sense." *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681-682. In the words of Mr. Justice Cardozo, "the fundamentals of a fair hearing were not conceded to the company." *West Ohio Gas Co.* v. *Commission* (No. 1), 294 U. S. 63, 70; *West Ohio Gas Co.* v. *Commission* (No. 2), 294 U. S. 79, 81. Again in the words of Mr. Justice Brandeis, the ignoring of uncontradicted evidence is an "error * * * fundamental in nature" which "vitiated the whole process of reasoning by which the Department reached its conclusion" and constitutes "a denial of due process." *Northern Pacific* v. *Department of Public Works*, 268 U. S. 39, 44-45. Petitioner was thus deprived of a fair hearing before the Board in the first instance, and of that judicial review which both the Constitution and the Labor Relations Act itself guarantee.

reasons: (A) The employees' written contract of employment, fixing a definite term, had expired prior to the date of the alleged discriminatory refusal of reinstatement; and (B) there was no failure to bargain on the part of petitioner upon which to predicate those provisions of the order.

(A)

Since the strikers' contract of employment had expired by its terms prior to the date of the petitioner's alleged wrongful refusal to reinstate them, the Board's order requiring reinstatement and back pay thereafter was arbitrary, unauthorized, and unlawful.—All of the employees here involved had entered into a contract with petitioner, which listed each employee by name and number and specified his type of position, department, and wage rate (1 R. 95-97). It was clearly, as this Court has said, an employment contract. *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342. The court below so referred to it (4 R. 2047).[9]

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[9] Even in the absence of statutory authorization for a union to be the bargaining agent of the employees, it is established that a collective bargaining agreement entered into between an employer and a union is a contract governing the tenure of employment and the wages of the employees, that an employee may sue the employer on that contract, and that an employee is bound by the terms of such a contract. *Rentschler* v. *Mo. Pac. R. Co.*, 126 Neb. 493, 253 N. W. 694, 95 A. L. R. 1; *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705; *Christiansen* v. *Local No. 680*, 126 N. J. Eq. 508, 10 A. (2d) 168, 171; *Beatty* v. *C., B. & Q. R. Co.*, 49 Wyo. 22, 52 P. (2d) 404, 407; *McGlohn* v. *Gulf & S. I. R. Co.*, 183 Miss. 465, 174 So. 250, 254, and 183 Miss. 445, 184 So. 71; *Yazoo & M. V. R. Co.* v. *Sideboard*, 161 Miss. 4, 133 So. 669. In *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 632, there was involved an employee's suit for wrongful discharge, based on the contract between a union and employer.

Some courts have said a union is not the agent of the member generally but is only his representative for a limited purpose, while others hold a union to be the principal and not the agent, and that such rights as the employees have will depend upon the contract as made by the union. But all hold that the tenure and rights of individual employees accepting work under a union contract are governed

That contract of employment had expired by its terms on April 23, 1939 (1 R. 91, 94) and the Company had secured a full complement of 93 men in the places of the 84 strikers (1 R. 119; 3 R. 1388; 4 R. 1901-1906). Nevertheless, the Board ordered petitioner to reinstate and give each striker back pay from May 9, 1939—the month following the expiration of the employment contract—to date (1 R. 266, 271). In so doing the Board made, and the court below approved, a new employment contract for an additional term. But, where there is a written contract for a fixed term, it expires with the term. 4 Williston, Contracts (rev. ed. 1936) § 1027, p. 2844. "Collective bargaining agreements do not create a permanent status, give an indefinite tenure, or extend rights * * * beyond its life, when it has been terminated in accordance with its provisions. * * * The rights of the parties to work under the contract are fixed by the contract. They persist during, they end with, its term." *System Federation No. 59* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509, 515 (C. C. A. 5), cert. denied 314 U. S. 656. In the leading case of *Rentschler* v. *Missouri Pac. R. Co.*, 126 Neb. 493, 253 N. W. 694, 700, 95 A. L. R. 1, in which an individual employee was permitted to base his action for damages for wrongful discharge on a collective bargaining contract, the court said: "The contract between the union and the railroad company was limited to just one year, and therefore expired at the end of a year, and plaintiff could only recover for that period." See to the same effect *National Labor Relations Board* v. *Lion Shoe Co.*, 97 F. 2d 448, 453; *Perras* v. *Terminal R.*

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by the contract's terms. *System Fed. No. 59* v. *Louisiana & A. Ry. Co.*, 119 F. 2d 509, 514 (C. C. A. 5), cert. denied, 314 U. S. 656.

The Illinois courts have followed the Massachusetts rule laid down in *Donovan* v. *Travers, supra*, that a union is the principal and that the employee is bound by the contracts of the union. *Evans* v. *Johnston*, 300 Ill. App. 78, 93-94, 20 N. E. 2d 841, leave to appeal denied by Illinois Supreme Court and cert. denied 309 U. S. 662.

Assoc. of St. Louis, 154 S. W. 2d 417 (Mo. App. 1941); and *Knowles* v. *Terminal R. Assoc. of St. Louis,* 154 S. W. 2d 606 (Mo. App. 1941).

In the absence of a new written contract or an implied contract arising out of continued employment, there was nothing upon which to fix the terms or conditions of employment after the termination of the written contract here involved; for there were no standards or guides upon which to determine wages or any of the other elements of a modern labor contract. All authorities hold that rights of seniority and rates of pay depend wholly on contract; and there is no power in the Board to require the employees to serve beyond their agreed term of employment, or to order the employer to accept and compensate services beyond the fixed and written period upon which it had agreed. The National Labor Relations Act "does not compel agreements between employers and employees." *Labor Board* v. *Jones & Laughlin,* 301 U. S. 1, 45; *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 548; *Texas & N. O. R. Co.* v. *Railway Clerks,* 281 U. S. 548, 570-571. Only the parties—the employees and the employer—can make such a contract (*In re Buffalo & E. Ry. Co.,* 250 N. Y. 275, 165 N. E. 291, 292), at least under the circumstances here where they had entered a written employment contract and, as an express term thereof, had mutually agreed that it should terminate upon a fixed date.[10]

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[10] *Cf. Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 182, 187, where there was no general collective employment contract. Employees were hired under individual contracts of indefinite duration. There were vacancies to be filled, and they were being filled, but the employer refused to hire union men. The Board—and the reviewing courts—therefore had before them elements upon which to order employment of those applicants and compensation for their loss of pay following the unlawful refusal of employment. But in the present case there was a written collective employment contract prior to the strike, which had expired by its own terms as to the men named therein. Prior to that expiration date, none of the men

The statute does not supply a contract in these circumstances. Before the passage of the Act, a strike terminated the relation of employer and employee (*Birmingham T. & S. Co.* v. *Atlanta B. & A. Ry. Co.*, 271 Fed. 743, 745), and the only purpose of § 2(3) was to change that rule. Accordingly, § 2(3) of the Act provides that the term "employee" shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." The court below held that, despite the written agreement of the parties to the contrary, "when the employees went out on a strike because of the unfair labor practice of the company, their status as employees for the purpose of any controversy growing out of that unfair labor practice was fixed" by § 2(3) of the Act (4 R. 2047). But, manifestly and necessarily, the employee status of strikers may change despite the statute—as by death, the voluntary assumption of a different permanent employment, unlawful violence, or—as in this case—the agreed termination of the contract of employment.

Section 2(3) of the statute is purely negative in effect. It was intended to mean no more than that employee status shall not cease during a strike, *merely because of the strike*. Sen. Rept. No. 573, 74th Cong., 1st Sess., pp. 6-7. Here, for example, one of the strikers died and the Board recognizes that his status as an employee terminated thereby (1 R. 267). As against the contention that the status of striking employees becomes fixed and unchangeable, this Court has held that "such a legislative intention should be found in some definite and unmistakable expression" and has found "no such expression in the cited

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had asked reinstatement, and hence none were refused employment. When reinstatement was finally suggested, there were no vacancies to be filled (1 R. 119; 3 R. 1388; 4 R. 1901-1906) and the strikers did not even consider reinstatement except upon conditions they had no right to impose (see Point II(B) *infra*).

provision." *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 255. As the concurring Justice therein stated (p. 264), there may be a termination of the employer-employee relationship during a strike "for reasons dissociated with the stoppage of work because of unfair labor practices. The language which saves the employee status for those who have ceased work because of unfair labor practices does not embrace also those who have lost their status for a wholly different reason." In the last cited case this Court held that employee status was lost by the unilateral discharge of striking employees guilty of unlawful violence. *A fortiori*, where as here the employees and employer have mutually agreed upon a contract of employment with a fixed termination date, employment ceased by mutual consent. This Court has heretofore suggested that, if construed to continue terms of employment despite unlawful conduct of employees, § 2(3) would be of doubtful constitutionality (*id.*, at 255, 265); it would be more plainly so if construed to extend terms of employment beyond the written agreement of the parties. *Wisconsin Creameries* v. *Sheboygan Dairy Products Co.*, 208 Wis. 444, 243 N. W. 498, 501-502; 6 Williston, Contracts (rev. ed. 1936) § 1758, p. 4995.

Plainly, the Board had no authority to order reinstatement, and no authority to order back pay, after the mutually agreed termination of the employment contract.[11]

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[11] Once the employee-employer relationship had ceased, "respondent was * * * free to consider the exigencies of its business and to offer reemployment if it chose" and in so doing it would be "simply exercising its normal right to select its employees." *Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 259. It may be admitted that, if petitioner were hiring men and if the strikers here involved had made applications for employment at that time, petitioner could not refuse them employment because they were Union men (*Phelps-Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 182, 187). But here there were no vacancies after April 23, 1939, the date of the expiration of the Union contract (1 R. 119; 3 R. 1388; 4 R. 1901-1906);

Moreover, the decision of the Board and of the court below is in conflict with the important and settled decisions of other federal courts as well as state courts cited above. The question of the effect of § 2(3) of the National Labor Relations Act on term contracts of employment arises in many industries, is important, and should be decided by this Court. For these reasons, the case should be brought here for review.

(B)

There was no unlawful refusal to bargain upon which the order for reinstatement and back pay could be predicated.—In any event, as the Board recognized, the order for reinstatement and back pay could only be predicated upon the theory that the employer, by acts in violation of the statute, had caused the strike and was therefore required to reinstate the strikers when they applied for reinstatement and, having failed to do so, must compensate them with back pay for the period following the alleged refusal to reinstate (1 R. 259-260, 265-268). The only act of the employer asserted by the Board to have caused the strike is the alleged refusal to bargain collectively (1 R. 228-259). The Board predicated its finding to that effect upon one incident—the hiring of four men and their retention over the Union's objections (1 R. 237-259). However, the court below, in recognition of the weakness of the case on this point, attempted to justify the Board's order upon other evidence, as follows:

The organization of the plant in 1937.—The Board's evidence showed that there had been attempts by the employer to discourage the unionization of the plant in the spring

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those strikers who had theretofore made application had all been reemployed (4 R. 1901-1906); and the remainder had not even considered reemployment after that date except upon conditions they had no right to impose (see Point II (B) *infra*).

of 1937, and upon this evidence the Board made a finding of interference in violation of § 8(1) and in disregard of the rights guaranteed by § 7 of the Act (1 R. 219-228, 228, 233).[12] But the order for reinstatement and back pay was not predicated upon that finding and could not have been; for the plant was promptly organized, all the production employees joined the Union (4 R. 1891), the Company entered successive collective bargaining contracts with the Union (1 R. 91-97, 4 R. 1802-1806), and according to the written statements of the Union itself amicable relationships existed thereafter between the employees and their employer (4 R. 1891, 1933), except for the two incidents mentioned next below.

The Board found no refusal to bargain during that period. But the court below erroneously treats the aspects of that earlier phase of the industrial relations of the Company as one of the elements of the refusal to bargain (4 R. 2036-2040, 2040) and in so doing has departed from the findings of the Board itself. For the Board limits its statement of background with reference to collective bargaining to the origin of the terms of the contract the interpretation of which was in dispute in the single incident (the hiring in March 1939, treated below) wherein it found a failure to bargain collectively (1 R. 239-246).

The Meskan and Levy incidents.—In the spring and fall of 1938 the employees protested the transfer of an employee to a position in the blanket department. In the first instance, the Company gave way to the Union protests and the Board found "no basis for holding that the respondent refused to bargain collectively * * * concerning the Meskan transfer, since the respondent, whether willing or

[12] That finding, while specified as error (No. 6) and stated as a question presented (No. 6) *supra* for brief and argument upon the merits in case this petition is granted, is not argued herein as a ground for granting the writ.

not, acceded to Local 120's demand that it remove Meskan from the position of spreader's helper" (1 R. 230-233, 233). Similarly, the Company yielded to the Union protests against the later transfer of Levy and the Board again found "no basis for holding that the respondent refused to bargain collectively" (1 R. 233-237, 237). The court below, however, departs from the Board's findings and cites those two incidents as showing an "arbitrary attitude" on the part of the Company (4 R. 2041-2042, 2042). As a matter of fact, it is undenied that, even after those two incidents, the Company extensively negotiated with the Union with respect to the subject of transfers from one department to another (2 R. 894, 961-976; 3 R. 1085-1087, 1102, 1105-1106, 1117-1122, 1124, 1213-1214, 1240; 4 R. 1806-1807). The Board found no refusal to bargain until March 1939, in connection with the hiring of four men, as follows:

The alleged refusal to bargain collectively in the hiring of four men in March, 1939.—Since the blanket department had gotten well into commercial production and was overwhelmed with work (3 R. 1070, 1073), the Company hired four new men to start work on March 2, 1939 (1 R. 237) at the minimum plant wage (2 R. 839; 3 R. 1187-1198; 4 R. 1941, 1943, 1951, 1953, 1955, 1957) which was less than 77 of the then 89 production employees were paid (1 R. 95-97).[13]

When these men reported for work, a controversy with the Union ensued. Since the employees in the blanket department performed highly specialized tasks of a precise nature, the matter of hiring in and transfers to that de-

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[13] The blanket department, being undermanned, was far behind in production and was forced to work overtime two hours each regular working day and also on Saturdays (2 R. 968, 1036; 3 R. 1070-1073). The employer had built additional machines for the blanket department, had arranged to build still more, and planned to put 14 to 16 additional men to work (2 R. 969, 973; 3 R. 1355).

partment was of the highest consequence as a matter of management.[14] Accordingly, in lieu of the closed shop and strict seniority provisions for which the employees had been contending (1 R. 517-518; 2 R. 636-637, 851-853, 861-862, 869-872, 876-877; 3 R. 1326-1340), the Company in the second contract with the Union had agreed only that "all applicants for employment shall be referred to the Shop Committee before going to work" (1 R. 92) and that "promotions shall be made in accordance with seniority so far as practicable, consistent with efficient operation" (1 R. 94, 238).[15] Since, in the incident here in issue, only hiring was involved, upon going to work the four new men were referred to members of the shop committee as the Board found (1 R. 237 n. 21). Not only was each of the new men told to join the Union and put in touch with the shop committeemen, but all were willing to join the Union (2 R. 839-841; 3 R. 1198-1199, 1142-1143, 1150; 4 R. 1581).[16]

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[14] See notes 2 and 3 *supra*.

[15] A transfer to the blanket department was not a promotion. There was no increase of wages on such a transfer. Beginners in the blanket department had to start at $25 a week, the minimum plant wage (1 R. 94; 3 R. 1079-1080, 1110, 1242). The average wage in the blanket department was less than the average wage in two of the other departments; the highest wages in the blanket department were less than the highest wages in other departments (1 R. 95-97). The work in the blanket department was neither more easy nor more pleasant, and in fact the heat and atmospheric conditions in the blanket department made it a less desirable place in which to work (2 R. 964). The only advantage (a disadvantage to some) of working in the blanket department was that at that time there was more overtime work in that department (2 R. 967-968, 1035); but that was a temporary condition due to the then shortage of workers in that department.

In any event the employer did not now attempt to transfer any employee to the blanket department. It did not because such a transfer was not, in the words of its contract with the Union, "practicable" and was not "consistent with efficient operation."

[16] Two of these new men, Haserodt and Prevost, joined in the strike which occurred a few days later and are among the 83 strikers ordered reinstated by the Board (1 R. 113; 2 R. 837-838; 4 R. 1582).

The Union, however, was not content but, as the Board found, took the position—despite the express language of the contract with the company—that the Company was required to negotiate with the Union respecting, and obtain its prior approval before, the hiring of new personnel (1 R. 238).[17] Thereupon an extended conference was arranged and took place on March 6 for four or five hours or more (1 R. 248; 2 R. 974, 1044; 3 R. 1346, 1360, 1363) between the five members of the shop committee reinforced by two representatives of the international union (1 R. 529; 3 R. 1347) and three representatives of the Company (2 R. 973).

At this meeting it is undenied that the Company representatives asked the grievance and expressed a willingness to negotiate respecting it (1 R. 358-359; 2 R. 887, 1047; 3 R. 1348, 1355), heard the Union's position that the hiring was a violation of the "harmonious relationship" clause of the preamble of the Union contract (2 R. 887-888; 3 R. 1349), and discussed the Union's position that the new men should have been referred to the shop committee in a body rather than individually (2 R. 888-889; 3 R. 1350). They obtained an acknowledgment from the Union representatives that all four of the newly hired men were willing to join the Union (2 R. 889; 3 R. 1350), and that all members of the shop committee had had full knowledge of the four new men within a few minutes of their reporting for work on March 2 (1 R. 498-499; 2 R. 889, 891; 3 R. 1350) and were

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[17] On March 2, immediately upon being informed of the employment of the four new men, the shop committee protested to the factory manager, Schwartz, claiming that under the Union's contract new employees could not be hired unless first found acceptable by the shop committee. They also claimed that positions in the blanket department were required to be filled by transfers from other departments. Rapport, the Company president, participated in part of this ten-minute discussion (1 R. 319-332, 467-469; 2 R. 652-654, 971-972; 3 R. 1199-1200).

in possession of all the facts relating thereto (1 R. 498-499; 2 R. 889-891, 894, 1047; 3 R. 1350-1351). The employer representatives were informed that the Union had no personal objection to any of the four new men hired (1 R. 498-499; 2 R. 889-891, 894; 3 R. 1350-1351). The Union representatives then shifted the argument to the meaning of the seniority provision respecting promotions (1 R. 362, 494; 2 R. 890-893; 3 R. 1351-1355). The question was discussed whether the hiring of new men and the filling of the four new positions at the lowest wage was a "promotion" (1 R. 324, 358, 365-366, 494; 2 R. 890-891, 892, 897), and whether strict seniority was practicable in all instances in view of the technical nature of the work in the blanket department (2 R. 892-894; 3 R. 1353, 1419).[18] The Union representatives then claimed that the hiring was a violation of the seniority proposal submitted by Rapport in 1938, but the employer representatives at the meeting pointed out that that proposal had been rejected by the Union itself (2 R. 891-892; 3 R. 1354); and a similar claim that Rapport had made a promise that no hiring would be done except with the approval of the shop committee was refuted by showing that changes had been made in the proposed contract to eliminate all requirements of a closed shop nature

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[18] The Union claimed that appointment to a blanket department job, even though at the lowest plant wage, was a promotion and that senior production employees from other departments should be transferred before new employees were engaged (1 R. 324, 358, 362, 365-366; 2 R. 890; 3 R. 1351-1352, 1419-1420). The employer claimed that the filling of a beginner's position in the blanket department, invariably at the minimum plant wage, was obviously not a promotion (2 R. 890, 897, 966; 3 R. 1351-1352) and that in any event, in the words of the seniority provision itself, it was not "practicable" and not "consistent with efficient operation" to transfer the senior janitors and common laborers to the blanket department (2 R. 892-894, 963-964; 3 R. 1353-1355). One of the most active of the Union representatives later admitted doubt "as to whether or not according to our contract we have any legal legs to stand on" (4 R. 1774).

and that the Company had always taken the position that the selection and assignment of new employees was a right of the management (2 R. 891-894; 3 R. 1351, 1355, 1361-1362). The discussion also embraced the burden which the management bore in connection with the problems of selection and assignment of employees, the danger of prohibitive losses which would be incurred by incompetent employees, and the need of more men in the blanket department (1 R. 324, 328; 2 R. 893, 1045; 3 R. 1352-1354). There was a discussion of prior transfer negotiations between the foremen and the shop committee (1 R. 325, 474; 2 R. 656, 894, 974, 1046; 3 R. 1352-1353), a suggestion that for the new positions the Union select two men and the Company two (1 R. 327, 475; 2 R. 896-897, 1048; 3 R. 1361), and the threat of a strike as to which the Company representatives pointed out that its contracts and the need of servicing through the composition and mercury departments made it necessary to keep the plant in continuous operation (1 R. 328; 2 R. 897-898; 3 R. 1357-1359). One of the Union representatives expressed the view that the controversy over the hiring of the four men was trivial and unimportant (1 R. 474, 495-496; 2 R. 655, 886-887, 1044; 3 R. 1348).

At the March 6 meeting the Union also demanded that one Schrambeck be discharged because the Union trial board had voted to expel him from the Union (2 R. 667-668, 895-896, 975, 1049; 3 R. 1356). The following day he was expelled from the Union, on an undisclosed ground; and then, on March 8 and 9, the Union in writing demanded, under threat of "drastic action," that the Company discharge that employee (2 R. 975; 4 R. 1915, 1917). But Schrambeck was an old and satisfactory employee; the plant was understaffed as has been said; and the employer, knowing of no cause for the discharge of Schrambeck, declined the demand (4 R. 1845).

The following day, March 10, there were two more discussions between the representatives of the Union and the Company (1 R. 331-332, 477; 2 R. 976, 1051-1052), at which the Company president pleaded with the shop committee to avert a strike (2 R. 976-978, 980). The Union witnesses themselves testified that the Company president then said that "no one wins in a war" (1 R. 332; 2 R. 658).[19] Nevertheless, on the same day, March 10, 1939, immediately after the last conference, the Union leaders called the strike (1 R. 333-334, 478; 2 R. 979), in which all of the employees joined except Schrambeck and two of the four new employees (1 R. 250; 4 R. 1898-1900). The Union leaders had asked their international union for strike authorization on the same day that the new men had been hired, and the local had voted to strike the following day (1 R. 248; and see the chronology set forth in the Appendix *infra*).

But negotiations continued even after the strike (1 R. 252). On March 13, 1939, Harry E. Scheck, a conciliator for the Department of Labor, held a two-hour meeting in his office attended by the shop committeemen and Company representatives but no agreement was reached (3 R. 1364-1368), the Company declining the conciliator's suggestion that the parties submit the matter to arbitration (2 R. 901-902; 3 R. 1367). On March 16, 1939, at another meeting in the conciliator's office, the Company representa-

[19] The circumstances of those discussions were as follows: On receipt of a telegram from the international union authorizing a strike (1 R. 330, 476) the shop committee and the Union president held a conference with Rapport at which they proposed a compromise involving the discharge of one of the four new men and transfer of Levy to the blanket department (1 R. 250-251, 331-332, 477; 2 R. 977-978) but continued to demand the discharge of Schrambeck (2 R. 976, 1051-1052). This meeting was adjourned until after lunch (1 R. 477). Upon resumption, Rapport said his former decision would have to stand (1 R. 332-334, 478; 2 R. 658-659, 976-978, 980).

tive offered to take all the men back on two conditions—that the Company be allowed to retain the four new men and that no one guilty of vandalism be reemployed (3 R. 1374)—but the Union refused the proposal, reiterating its demand that the four men be discharged and that the Company agree to engage no one in the future without the approval of the shop committee (3 R. 1375). On March 27, 1939, another meeting was held in the law office of the Company's attorney, at which its president and its attorney represented the Company. In addition to the shop committee, the United States labor conciliator and an assistant corporation counsel of the City of Chicago were also present (3 R. 1378-1379). At that meeting emphasis was placed upon the continued demand for the discharge of Schrambeck (3 R. 1380-1381; 4 R. 1697, 1778-1779, 1909, 1911). By that time many new men had been hired in the plant and there was not room for immediate reemployment of all the strikers, but the Company offered to take back immediately all those for whom it had vacant positions (3 R. 1380-1382, 1911). The Union refused to return unless all persons who had been employed to take their places were discharged (2 R. 916-917; 3 R. 1380-1382; 4 R. 1930). At this meeting the matter of the interpretation of the Union's existing contract was discussed; a Company representative stated his belief that the Company's interpretation had been correct (1 R. 252; 3 R. 1381); and a Union representative cut off further discussion, saying: "If you feel that way about it I don't see the use of this meeting. We might as well go" (3 R. 1381-1382).

There was no refusal to bargain.—Despite these facts, the Board found, as to the hiring of the four men, that petitioner had refused to bargain collectively "with an open fair mind" (1 R. 256-257). Upon this finding it

predicated its order for reinstatement and back pay (1 R. 259-260, 266-267, 271-272). But the basic finding is clearly arbitrary and unlawful, for the following reasons:

(1) From the foregoing statement of admitted and undeniable facts, it is clear that the Company not only negotiated and collectively bargained with the Union but it (a) recognized the Union, (b) made successive contracts with it, and (c) acceded to two of its three demands respecting transfers and hiring. As to the hiring of the four men, not only were there extensive negotiations as set forth above but the Union itself precipitated the strike as is shown by the chronology of events from March 2 to March 10 set forth in the Appendix to this petition. Plainly there was no refusal to bargain.

(2) As to the provision of the Union contract relating to seniority, the employer fully complied with its "obligation to meet and bargain with [the] employees' representatives respecting * * * its true interpretation" in accordance with the precisely applicable facts and rule laid down by this Court in *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342-343; and the Board itself, as has been stated, expressly found no failure to collectively bargain with respect to the two transfer incidents here involved (1 R. 233, 237).

(3) Assuming that there was an issue as to the interpretation of the contract clause requiring that "applicants" be "referred" to the shop committee "before going to work", it is undeniably true, as set forth above, that the Company (a) referred the four new men to the committee within a few minutes of their reporting to work, (b) the committee had full knowledge of all the facts respecting them, (c) the Union had no objection to them personally, (d) they were willing to join the Union, (e) two of them joined the strikers and the Board has ordered them rein-

stated with back pay, (f) the Company negotiated intensively and repeatedly with the Union in the matter, and (g) the Union nevertheless precipitately called the strike.

(4) Not only did the Union not seriously rely upon the contract provision relating to the "reference" of newly hired employees to the shop committee "before going to work", but they placed emphasis upon the wholly different clause to the effect that

> Promotions shall be made in accordance to seniority so far as practicable, consistent with efficient operation. (1 R. 238.)

But here there was involved no promotion; the Company had merely hired four new employees at the minimum plant wage; and it so pointed out in its discussions with the employee representatives (see notes 15 and 18 *supra*). Upon the Union's insistence that the contract should be interpreted otherwise, the Company undertook the extended and intensive discussions set forth above.

(5) The immediate cause of the strike was at least as much the refusal of the employer to discharge Schrambeck who, for some undisclosed reason, was expelled by the Union—but there was not even an assertion that any provision or interpretation of the contract covered that situation. Not only under the facts was there no substantial claim by the Union respecting the interpretation of the contract, but the Union asked no modification or amendment thereof. Amid the confused claims, the Company did all it could reasonably be expected to do to reach an understanding and still preserve what it regarded as indispensable in the management of its business.

(6) The employer's only dereliction was its failure to agree to all the Union demands. Indeed, the court below branded petitioner's failure to agree, or "compromise", as

an "intransigent attitude" manifesting a refusal to bargain; and regarded unsuccessful negotiations as "purposeless talk" for which the employer alone is responsible (4 R. 2045). But Congress plainly intended that under the act employers should not be required to agree to all employee proposals, or indeed to any, so long as a bona fide attempt is made to reach an understanding. As Senator Wagner explained to the Senate when the measure was before it, the measure does "not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him."[20] This Court has been specific that the Act does not compel either party to agree.[21]

(7) What the Board, and the court below, have actually done is take detached excerpts from the record and upon them predicate a finding of lack of good faith. To that finding on the record there are conclusive answers. Pre-

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[20] 79 Cong. Rec. 7571 (1935). The legislative history of the Act is unequivocal on this point. "The bill requires no employer to sign any contract, to make any agreement, to reach any understanding with any employee or group of employees." "All employers are left free in the future as in the past to accept whatever terms they choose." Senator Walsh, 79 Cong. Rec. 7660 (1935). See also Sen. Rept. 573, 74th Cong., 1st Sess., May 2, 1935; and the decision of the Board in *Pittsburgh Metallurgical Co., Inc.*, 20 N. L. R. B. 1011 (1940).

[21] "The Act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.'" *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 45. See also *Virginian Ry.* v. *Federation*, 300 U. S. 515, 549, 557 note; *Labor Board* v. *Mackay Co.*, 304 U. S. 333, 345-346; *Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343, 344.

The decision in the case at bar is sharply inconsistent with the position manifested by the Board itself in its recent decision in *Montgomery Ward & Co., Inc.*, 39 NLRB No. 41, February 26, 1942, in which, notwithstanding the employer refused to yield to the Union's demands for a closed shop and arbitration, the Board held that the employer had not refused to bargain collectively. And see *National Labor Relations Board* v. *Express Pub. Co.*, C. C. A. 5, June 12, 1942, 3 C. C. H. Labor Law Service ¶6110.

liminarily, it may be noted that Congress did not intend that, in proceedings under the Act, the inevitably sharp interchanges in the conference room should be recanvassed and appraised in Board hearings. As Senator Walsh stated to the Senate when the then pending measure was before it, "What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 Cong. Rec. 7660.[22]

While it must be assumed that employer representatives made the statements attributed to them by the Union representatives and found by the Board, those cannot outweigh the obvious facts that the Company did negotiate and did bargain collectively respecting the Union's contentions as

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[22] It is notable that the Board refrained from producing the testimony of several Union participants in the meeting. The witnesses for the Board who undertook to narrate the proceedings of the March 6 meeting were Nielson (1 R. 323-328, 355-371), Moore (1 R. 248, 472-476, 491-499) and Sevenberg (2 R. 655-657, 667-668). The testimony of these three witnesses as to what was said at the meeting is vague, superficial, indefinite, and incomplete. They frequently stated that they did not remember what was said at the meeting on given subjects. Lanning and Bunger, national representatives of the Union who participated in the meeting, were experienced negotiators but they were not called to testify. Lanning was present at the hearing but was not put on the stand (4 R. 1799-1800). One of the shop committee members, Stephen Meyers, who was at the meeting (1 R. 529; 3 R. 1347), was twice a witness for the Board (1 R. 422-424; 4 R. 1570) but on neither occasion did he testify as to this meeting.

A stenographic report of the discussions of the five-hour meeting would undoubtedly make a transcript of more than 100 pages, yet the three Board witnesses attempted to narrate the discussion in a few brief answers.

Not only was the manifest impossibility and unwisdom of any attempt to unravel the mesh of a collective bargaining conference recognized by Congress as shown above in the text, but had it been intended that negotiations should be recanvassed by the Board in its proceedings Congress would have devised a technique whereby records of such negotiations might be made. The attempt of the Board to depart from the salutary intent of Congress can have the effect only of discrediting the Act and debasing procedure thereunder.

to the interpretation of the contract. The Board, however, picks detached phrases as showing a closed mind (1 R. 247-249, 254-255), but plainly those warrant no such finding for three reasons: (a) The statements attributed to the Company president as of March 2 (1 R. 246-247, 254-255) were not made in the course of bargaining but in the few moments of conversation which occurred on the morning the four new men were hired when the Union representatives first stated their complaint and requested an appointment for a subsequent conference as set forth above in note 17 and the text following it. (b) The Company promptly arranged and held a lengthy conference, in which several representatives of the employer participated, pleaded with the Union thereafter to avert the threatened strike, and negotiated even after the strike began. (c) The phrases italicized by the Board in reaching its conclusion (1 R. 247-249, 254-255) bear no such construction as the Board attempts to put upon them:

Even casual inspection of the record discloses that the parties to those conferences used their words in the light of the claims made by the Union. When the Union claimed that the *contract* meant that there must be "negotiation" with the Union as to the hiring of new men *preliminary* to any hiring, the Company representatives took the position that it had no such meaning and that, therefore, they were not required *by the terms of the contract* to negotiate individual cases *before* hiring. It was in that sense that the Company president made the statements (1 R. 321, 322, 468, 972) attributed to him as of March 2 in the Board's decision (1 R. 247, 254). It was in that sense that the Company representatives again used the words "negotiate" and "right" in the extended conference on March 6 (1 R. 248-249, 255). The point they were making was not that they would not negotiate with the Union, and not that the

Union had no right to negotiate; but they were merely stating their side of the controversy—that the *contract* did not require the Company to "negotiate" before each individual hiring and that the contract *by its terms* did not give the Union a "right" to insist upon such "negotiation."

These words and phrases cannot be read apart from their context, yet by the sheerest type of verbalism the Board has wrenched them from the background of the Union's contentions in the attempt to make it appear that the Company denied its general duty or willingness to "negotiate" and denied the "right" of the Union to have it do so. The Board, in short, has torn a handful of words from the record and, despite undisputed facts and events to the contrary effect, has made its finding of lack of good faith. This Court has recently remanded a similarly based case, saying that

> The employer * * * is as free now as ever to take any side it may choose * * * We may not consider the findings of the Board as to the coercive effect of * * * speeches in isolation from the findings as respects the other conduct of the Company. * * * If the utterances are thus to be separated from their background, we find it difficult to sustain a finding of coercion with respect to them alone. (*Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477, 479.)

That case, it may be noted, related to the initial organization of a plant where the anti-union bulletin and speeches may have had general effect; whereas in the present case the plant had been organized by the Union for two years, two successive collective contracts had been entered by the employer and employees, and the utterances are only those made during the collective bargaining process in response to the Union's interpretation of the then existing contract respecting the hiring of four new men.

Due regard for what this Court has long termed "the

substance, and not the shadow," which determines the validity of the exercise of administrative power (*Interstate Commerce Commission* v. *Illinois Central R. Co.*, 215 U. S. 452, 470), as well as the intent of Congress and petitioner's statutory and constitutional right to a fair hearing, require that this Court bring this case here for review. In the light of the undisputed facts, petitioner has been guilty of no refusal to bargain collectively within the meaning of the National Labor Relations Act; and, without the finding of failure to bargain, there was no basis for the order of reinstatement and back pay.

II. ASSUMING THAT THE EMPLOYEE RELATIONSHIP HAD NOT TERMINATED AND THAT THE EMPLOYER HAD REFUSED TO BARGAIN COLLECTIVELY, THE BACK PAY ORDER IS NEVERTHELESS UNAUTHORIZED AND REQUIRES THE EXERCISE OF THIS COURT'S POWER OF REVIEW.

Whether or not the employee relationship had terminated by the terms of the contract, or there had been a lack of good faith in the bargaining by the employer, as discussed in Point I above, the decree of the court below is nevertheless unlawful because (A) the remand places an unwarranted burden upon petitioner, and (B) the strikers have never offered to return to their jobs, except upon conditions they had no right to impose, so that there is no basis for the award of back pay.

(A)

In the terms of its remand of the case with instructions to determine deductions from back pay, the court below infringed the discretionary authority of the Board and imposed an unlawful burden upon petitioner.—The court below, though sustaining the order of the Board in other re-

spects, remanded the case with instructions to the Board to determine deductions from back pay for "unjustifiable refusal by the discharged and the striking employees to take desirable new employment" (4 R. 2051, 2073). In so doing, however, it confined such administrative proceeding to action on "such additional evidence, if any" as the Company might present. The petitioner is thus required, as though the proceeding were a mere private suit by the employer, to formulate its claim and theory on this subject.

The necessity of making deductions from back pay for employees' unjustified refusal to take other employment has been recognized by this Court. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197-200. But proceedings to that end are Board proceedings, not a private suit by the employer. *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362-363. As this Court has held, it is a matter "entrusted to the Board's discretion," "it is not mechanically compelled by the Act," and

> the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order. (*Phelps Dodge Corp.* v. *Labor Board, supra*, at 198-200.)

Here the Board had not considered the question. While the Circuit Court of Appeals had authority and was required to remand the case to the Board for a determination of the deductions, thereafter it is for the Board to determine the theory upon which it will proceed (*Phelps Dodge Corp.* v. *Labor Board, supra*, p. 198, note 7) and then to present its evidence and formulate its modification of the order. Petitioner is the respondent in the proceedings, and it is not for it to assume the burden of pleading or proof. To require petitioner to do those things not only infringes the Board's discretion but imposes an unlawful

and unwarranted burden upon petitioner. That error of the court below, therefore, requires the exercise of this Court's power of review.

(B)

The Board, and the court below, unlawfully ordered back pay for a period prior to any offer of the strikers to return to their positions.—Back pay has never been authorized or directed as to any period prior to an offer of strikers to return to work, and the Board did not purport to require it here.[23] But the Board found that the strikers had offered to return to work on May 9, 1939 (1 R. 259-260); and the Board's order (1 R. 265-266, 271-272), as well as the decree of the court below (4 R. 1072), requires back pay from that fixed date on the theory that the refusal to dismiss those who had taken their places and to reinstate the strikers on that date was a discrimination forbidden by the Act.[24]

But it is not denied that the strikers did not offer to return to their jobs unconditionally. In the course of a

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[23] For the practice of the Board, see the second paragraph of note 7 of the opinion of this Court in *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 198-199. See also the Fourth Annual Report of the Board (1939), pp. 100-102; *Hemp & Co. of Ill.*, 9 NLRB 449, 462 (1938); *C. B. Stout, d.b.a. Majestic Flour Mills*, 15 NLRB 541, 565 note 26 (1939); and *Somerset Shoe Co.*, 12 NLRB 1057, 1059 note 3 (1939), remanded for adjustment of back pay date, 111 F. 2d 681, 689-690.

It may be noted that the strikers in this case were acting upon the theory that they would be paid during the strike and, even before the strike began, had resolved to "demand back pay for every day they are on strike" (4 R. 1841).

[24] "Later orders have started back pay five days after application." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 199 note 7. Even assuming that there was here an offer to return to work which the employer was bound to accept, still reinstatement is not necessarily feasible *instanter* and the Board should have clarified and adjusted its order respecting back pay as was required in *National Labor Relations Board* v. *Somerset Shoe Co.*, 111 F. 2d 681, 689-690 (C. C. A. 1).

hearing in a State court upon an application to restrain violence and other unlawful conduct of the strikers, suggestion was made by the local master in chancery that the parties settle the strike; the Company promptly agreed to take back as many of the 84 strikers as could be used without displacing workers who had been obtained meanwhile in order to keep the plant running; but the Union would not agree unless all of the strikers were reinstated in a body (2 R. 1018-1019; 3 R. 1398-1400) as the Board itself found (1 R. 252, 259).

The strikers did not make any offer—they merely rejected the employer's offer. The effect of their counterproposal was that they would assent to a settlement of the strike only upon condition that (a) all strikers were immediately reinstated, (b) consequently all new employees would have to be discharged, (c) including two of the four new men whom the Union had objected to hiring just before the strike (the other two having joined the strikers are now required to be reinstated and are now presumably acceptable to the Union), and (d) Schrambeck, whom the Union had expelled and who therefore did not join the strike, would have to be discharged. The Union "just couldn't entertain a part of these men going back and sitting down and working with the non-union men" (2 R. 1019; 3 R. 1399).

In other words, the strikers offered to return to work if all their demands, which are alleged to have occasioned the strike, were first met. It was not an offer to cease striking and return to work, but a demand that the Company surrender and capitulate on every point. Viewed in its most favorable light, it was not more than a counter proposal for discussion which led to various, though ultimately fruitless, meetings between the parties (3 R. 1399-1400). The Company in those negotiations offered to take 10 or 20 strikers back at once and the remainder (except those

guilty of violence and sabotage) as rapidly as possible (1 R. 252; 2 R. 1018-1019; 3 R. 1398-1400), but the Union refused. The Board itself stated that "there is no testimony that any of the strikers made individual applications for reinstatement" (1 R. 259); and the record shows that all of the six strikers who made application for reinstatement were given their old jobs (4 R. 1901-1906). The strike thus continued not only beyond the date of the so-called offer of May 9, 1939, but throughout all of these proceedings and to date.

In these circumstances, there was no offer to cease striking and return to work, and consequently there was no refusal to reinstate strikers, such as would authorize the Board to require back pay and fix the date from which it could lawfully be computed. The action of the Board in inventing such an offer and date—which the court below accepted without question (4 R. 2047)—was arbitrary and unlawful. It is simply an indirect means of penalizing the employer's failure to accede to the Union's demands. It requires the exercise of this Court's power of review.

CONCLUSION.

This case presents questions important in the administration of the National Labor Relations Act. Among them are (1) the extension of term contracts of employment beyond the agreement of the parties, (2) the lawfulness of a finding of failure to bargain where extensive bargaining is manifest, (3) the authority of reviewing courts to limit and prescribe administrative procedure upon remanding a case to the Labor Board, (4) the authority of the Board to order back pay for strikers during most of a period of a still continuing strike, and (5) the lack of due process or fair hearing in administrative and judicial proceedings which ignore indisputable and admitted evidence. Conflicts

in the decisions of lower courts, the proper interpretation and administration of the Act, and justice to petitioner require that the case be brought here for review.

Respectfully submitted,

HOMER CUMMINGS,
CHARLES LEROY BROWN,
Counsel for Petitioner.

July 1942.

APPENDIX.

Chronology of Events, March 2-10, 1939 [25]

March 2.—Four new men report for work (4 R. 1941, 1943, 1949, 1955)

7:30 a. m. shop committee discusses matter with factory manager and Company president (1 R. 319-322, 467-469; 2 R. 652-654, 971-972; 3 R. 1199-1200)

In evening local Union president writes international union president asking authorization to strike (4 R. 1575, 1891)

March 3.—Union votes strike at noon-hour meeting, 50 to 21, and secretary reports vote to international president by letter (4 R. 1576, 1895)[26]

During afternoon Union committee requests conference with petitioner; and meeting is arranged for next working day, Monday, March 6 (3 R. 1201)[27]

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[25] The Board witnesses were in great confusion and error in their original testimony with respect to the dates of the hiring of the four men and of the events following. The Board's decision refers to the errors as to chronology of these witnesses and finds that the dates hereinafter stated are the correct dates (1 R. 237, 248, 250, 257, 258).

[26] The Board finds that the minutes of the Union meetings at which the strike vote was taken incorrectly recite the date (1 R. 258). Those minutes were not written until many months afterwards and the date was then filled in from memory (4 R. 1572-1573). The minutes, written in August 1939, recited that the strike vote meeting was on February 28 (4 R. 1839). The trustworthiness of the minutes may be judged by the minutes' recital of the vote being 61 to 23 (4 R. 1839), whereas the letter written on the day of the meeting by the secretary of the Union to the president of the international gave the vote as 50 to 21 (4 R. 1895).

[27] At first the Union witnesses falsely testified that they tried for a number of days to get an appointment to see the Company president; they were then under the impression that the strike vote had been taken February 28, and they testified that the factory manager "stalled" them for many days about this proposed meeting (1 R.

March 4.—Union's international president replies to Union's letter of March 2 that it is not possible to sanction strike without results of strike vote by local (4 R. 1893)

March 5.—Sunday

March 6.—Representatives of employer and employees have long conference and discussion set forth in Point I(B) of the argument *supra*

March 7.—Union expels Schrambeck (1 R. 257; 4 R. 1841)

March 8.—Union delivers to factory manager written demand for discharge of Schrambeck for undisclosed reason under threat of "drastic action" (4 R. 1915); manager declines to discharge Schrambeck (4 R. 1845)

March 9.—Union president sends factory manager second peremptory demand for immediate dismissal of Schrambeck (4 R. 1917)

March 10.—Local Union receives strike authorization from international union (1 R. 330, 476)

Union immediately confers with factory president; meeting adjourned until after lunch; meeting resumed without reaching agreement (see note 19, *supra*)

2:30 p. m. strike begins (2 R. 979).

319, 322, 470-471, 528). Later it was conclusively established that the strike vote was taken on March 3 (4 R. 1891, 1895), that the application for the appointment with the employer's representatives was not made until the afternoon of that day (2 R. 973; 3 R. 1201), and that it was granted for the very first ensuing working day, the following Monday; and the Board so found (1 R. 258, 248). The Board witnesses then changed their testimony as to the chronology (4 R. 1542-1546, 1558, 1566, 1572-1580).

No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1942

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v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 2035–2050) is reported in 126 F. (2d) 452. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 216–274) are reported in 33 N. L. R. B., No. 108.

JURISDICTION

The decree of the court below (R. 2070–2073) was entered on May 8, 1942. A petition for rehearing (R. 2051) was denied on April 9, 1942 (R. 2052). The petition for a writ of certiorari was filed on July 6, 1942. Jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether there is substantial evidence supporting the finding of the Board, which was sustained by the court below, that petitioner refused to bargain collectively in violation of Section 8 (1) and (5) of the National Labor Relations Act.

2. Whether members of a union who strike as a result of an employer's unfair labor practices lose their employee status within the meaning of Section 2 (3) of the Act solely because of the expiration during the strike of a collective labor agreement between the employer and the union.

3. Whether an employer has the right to reject an application for reinstatement made by a union on behalf of its members who have struck as a result of the employer's unfair labor practices solely because it requires the reinstatement of all of the strikers and discharge of those hired during the strike to replace them.

4. Whether, under the circumstances of this case, the court below, in remanding to the Board the back pay portion of the Board's order for presentation by petitioner of evidence of unjustifiable refusal by discharged and striking employees to take desirable new employment, imposed an unlawful burden upon petitioner.

The following question is urged by petitioner, but is not, we think, properly presented.

5. Whether, under the circumstances of this case, the court below, in remanding to the Board the back pay portion of the Board's order for presentation by petitioner of evidence of unjustifiable refusal by discharged and striking employees to take desirable new employment, infringed the discretionary authority of the Board.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act of July 5, 1935, c. 372, 49 Stat. 449 (U. S. C., title 29, secs. 151 *et seq.*) are set forth in the Appendix, *infra,* pp. 23–25.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 216–274). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

Shortly after Local No. 120, United Rubber Workers of America (hereinafter referred to as the Union) began to organize petitioner's employees in the spring of 1937 (R. 219–220; R. 228–289), petitioner sought to prevent it from gaining a foothold in its plant. Petitioner's president,

[1] In the following statement the references preceding the semicolons are to the Board's findings, and the succeeding references are to the supporting evidence.

Rapport, in the latter part of March 1937 and the early part of April 1937, held mass meetings of the employees at the plant on company time, at which he attacked the collective activities in the plant, threatened to move the plant to another community if the men joined a union, disparaged the effectiveness of unions and the character and motives of their leaders, and charged that "there is a movement afoot to bring in outsiders here and cause me trouble" (R. 220–221; R. 293–295, 434–435, 511–514, 564, 566, 609–610, 633–635, 687–689, 1016–1064, 1162–1164). At the first meeting which he held Rapport also closely questioned several employees, organizers of the Union, before the entire assemblage. At the second meeting Rapport suggested that the employees form a "little inside organization" and offered to make substantial financial contributions to it (R. 221, 223–224; R. 297–299, 438–439, 566–567, 608, 634–635; R. 931–932, 989–1002, 1060–1061, 1064).

Soon after the first meeting Rapport warned a group of employees: "I will get even with these fellows who don't play ball with me. It may take me one year or it may take me five, but I will get even" (R. 221–222; R. 436–437, 296). At about that time petitioner granted to all the production and maintenance employees a $2-a-week increase "to keep them from joining the union" (R. 122, 126; R. 1438–1439, 296, 391, 431, 437, 513, 551–552, 569, 574, 635, 690–691, 936, 946, 996–997, 1002, 1062),

and shortly thereafter offered substantial wage increases and long-term employment contracts to three of the leaders in the organizational drive on condition they "stay out of the union" (R. 222–223; R. 513–514, 296–297, 689).

As the employees left the plant after the second mass meeting, Rapport sought to dissuade the men from attending a union meeting and to prevent them from receiving organizational leaflets which were being distributed outside the plant (R. 224; R. 300, 426–430, 438–441, 514–515, 588, 1448). Referring to the organizers and the Union as "racketeers" he again stated that he would "close down" and move the plant before he would permit the Union to "get in" (R. 224–225; R. 1443–1450, 300–301, 439–441, 515, 582, 939–940, 1167–1168, 1207, 1455, 1458–1461). Other officials of petitioner also participated in related efforts to defeat the Union (R. 225, 227; R. 560, 570, 584–585, 623, 695–696, 791–793, 799–800, 819–820, 1125, 1129, 1180, 1211–1212).

On April 23, 1937, petitioner entered into a collective bargaining contract with the Union (R. 226; R. 100). During the period when this agreement was negotiated and in force, petitioner manifested a continuing hostility to the Union and a determination to unseat it when an opportune occasion should be presented. In April 1937, during the conferences between petitioner and the Union (R. 226; 100–101), Rapport stated that he "wouldn't recognize the union under any circumstances * * *

if it weren't for the fact that he had a lot of orders waiting to be shipped out", that the Union "had him by the neck, and if he ever had the opportunity he would get even * * *" (R. 226; R. 1435), that the employees who constituted the Union's bargaining committee were "rats, disloyal rats", and that he would "get even with" and in time "get rid of" them (R. 226; R. 1436–1438, 1440, 1685).

Shortly after the execution of the contract, Rapport openly interfered in the internal affairs of the Union, demanding that it "remove" employee Moore from its Shop Committee because Moore was a Negro (R. 226–227; R. 303–304, 516). In June 1937 Rapport berated Moore for having organized the Union, warned Moore that he would regret his union activity, deprecated the Union's motives in selecting him as a shop steward and sought to induce him to act as a labor spy (R. 227; R. 448, 951). In April 1938 Rapport threatened Moore with a crank handle when the latter sought to present a grievance, and said to him: "You bastard, you no good son-of-a-bitch, I will bust your head open. You have no right to be telling me how to run my factory * * * you no good son-of-a-bitch, you have no right to be a shop steward, you are a janitor, that is all you are, that is all you ever will be. You went to college and came here and you fill these guys' heads full of union ideas and organizing the union. I will get rid of you and the union" (R. 231; R. 444–446, 1012-1013, 1068, 1476–1477,

1493–1494). The Board found that by the above-described conduct petitioner interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act (R. 228, 233).[2]

In April 1938, prior to the expiration of the 1937 agreement, petitioner transferred employee Meskan to its blanket department (R. 239; R. 592, 1178–1179, 441–442, 1004–1005). When Union Shop Committeeman Moore urged that persons with greater seniority ought to have been preferred to Meskan (R. 230–231; R. 442-443, 1179), President Rapport denounced Moore and the Union in the manner described above (*supra,* page 6). After insulting Moore further, Rapport announced his discharge, although Moore protested that all he had done was to present a union grievance (R. 232; R. 444–446, 448, 1013, 1495). Settlement of the dispute was reached only after petitioner's employees had stopped work in protest against its conduct (R. 232–233; R. 446–447, 948–951, 1012–1016, 1066–1069, 1495–1496).

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[2] These findings are summarized here because they demonstrate petitioner's continuing hostility to the Union. As the court below pointed out (R. 2040): "The making of the contract did not purge the Company of its acts of interference * * * which * * * continued after the contract had been entered into." The threats of reprisal against the Union illuminate petitioner's subsequent stand in the controversy about which the case turns. Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 586.

The 1937 agreement expired a few days later. During negotiations for a new agreement, the Union sought a closed shop, but accepted clause 1[3] of the agreement upon assurance by petitioner that this was a "substitute clause for the closed shop" (R. 239; R. 305–306, 451–452, 517–518, 536–537, 636–638, 851–854, 869–874, 882–883, 1024–1029, 1326–1327, 1332–1335, 1339–1341), amplified by Rapport's further assurance that he would not hire even his "own brother" if the Union objected (R. 239; R. 306–307, 451–452, 518, 536, 638, 952–953). The 1938 agreement also contained, in clause 10, the provision that: "Promotions shall be made in accordance to seniority so far as practicable, consistent with efficient operation" (R. 94).

In September 1938, despite the existence of clause 10 in the contract, Rapport, without previous con-

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[3] Clause 1 is as follows (R. 92): "The Employer agrees that its factory employees may join the Union and shall have the right to elect such representatives as they shall deem necessary to carry out the purposes of this agreement. The Employer agrees that it will not discriminate against any employee by virtue of his or her union affiliation or activity, or because of age, race, or nationality, or for the purpose of evading the spirit and letter of this agreement. The Employer further agrees to deal with the said Union and with its representatives as above stated in creating a satisfactory industrial relationship between the employer and its factory employees, in effectuating the provisions contained in this agreement. Employees further agree that they will cooperate with the Employer to promote the general welfare of the Employer and Employees, and to insure the perpetuation of amicable relationship between the parties thereto. All applicants for employment shall be referred to the shop committee before going to work."

sultation with the Union transferred employee Levy from the laboratory to the blanket department (R. 233–234; R. 311–312, 453, 519, 823–824, 955–956, 1180–1182). The Union protested vigorously, contending that this transfer constituted a violation of the contract (R. 235; R. 312–313, 393–394, 454–456, 518–520, 537–538, 641–644, 773–774, 955–960, 1132–1135, 1182–1184). Rapport, admitting the violation, requested the Union to allow the transfer as "a special favor this time * * *," promising, "I won't ask you to do it again" (R. 235; R. 455, 389, 312–313, 400–401, 644–645, 958–959). The Union refused to sanction this admitted breach of the contract, and when Rapport declined to remove Levy (R. 231; R. 645), petitioner's employees were forced once again to resort to a partial strike, ceasing work for 2 hours on September 9, 1938 (R. 236; R. 645). Rapport thereupon transferred Levy to his former job (R. 236; R. 456–458, 956–963, 1184–1186).[4]

[4] While the Meskan and Levy incidents were not made the basis of a Board finding that petitioner violated the act, the incidents form part of the "totality of the Company's activities during the period in question" (*National Labor Relations Board* v. *Virginia Electric & Power Company*, 314 U. S. 469, 477), and foreshadowed petitioner's ultimate determination to remove the matter of staffing the blanket department from the scope of bargaining negotiations. As the court below stated (R. 2042): "We have cited the instances of Meskan and Levy not as instances of refusal to bargain but to show the arbitrary attitude of the company in its dealings with the Union."

Ostensibly in deference to the Union's demands respecting the blanket department, in October 1938 petitioner submitted to the Union a proposed "System of Inter-Departmental Transfer to the Blanket Department" (R. 240; 459, 490–491, 1806–1807). The proposal expressly barred the Union's grievance committee from handling employee grievances arising in connection with the transfers (R. 240–241; R. 459, 490–491, 1807–1808).[5] The Union accepted most of the points embodied in this plan and submitted a few counterproposals; in response to petitioner's rejection of grievance machinery in the event of disputes between the foremen and the transferred employees, the Union conceded that "All transfers naturally will have to be approved by the foremen", but requested that the normal grievance machinery[6] be retained (R. 241–242; R. 1808). Petitioner failed to act upon the Union's suggested modifications of the plan and the entire

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[5] Section 8 of petitioner's proposal provided (R. 241; R. 1808): "All transfers are subject to the approval of the floor superintendent * * * The superintendent is the sole judge and his decision is final, and it does not come under the jurisdiction of the grievance committee."

[6] Clause 3 of the 1938 agreement provided (R. 92): "There shall be appointed in each of the various departments (rubber, blanket, composition, maintenance, and any and all additional departments that may be established) a Union representative who shall represent the employees in this department, and who shall in their behalf take up all grievances which may arise in such department with the department foreman and they shall cooperate and attempt to adjust such grievances amicably."

project lapsed thereafter (R. 241–242, 246; R. 315–317, 459–460, 523).

In January 1939 all the superintendents of petitioner's departments conferred with the Union respecting a list of future transferees to the blanket department (R. 242; R. 1809, 771, 1159, 541–542, 522–527, 648–650, 771–773, 965, 971, 1074–1082, 1101–1124). The Union submitted 12 names, in order of seniority (R. 242; R. 1809, 802). Although the superintendent of the blanket department conceded that he "could make spreaders"[7] of all those persons, except one, and all the superintendents agreed that at least two persons were qualified to work in the blanket department (R. 242; R. 1557, 1085–1087, 1105–1106, 1240), they nevertheless rejected the Union's list, without submitting an alternative proposal (R. 246; R. 1557). Again, no further negotiations were held and no agreement was reached (R. 242; R. 1557, 1124, 1038–1039, 1086–1087).

Later that month, Rapport, still without offering a substitute proposal, expressed contempt for the Union's list, berated the Union, threatened to move the factory out of town, and warned that "the next time I have trouble in the blanket department, it is going to be a different story" (R. 243–246; R. 461–463, 384, 982–983).

Despite the provision in clause 1 of the 1938 agreement (a "substitute clause" for the closed

[7] Employees of the blanket department.

shop, *supra,* p. 8) that "all applicants for employment shall be referred to [the Union's] Shop Committee before going to work" (R. 238; R. 92), during the last week of February 1939 petitioner hired four new employees and put them to work on March 2 in the blanket department, without having previously referred them to the Union's Shop Committee (R. 237; R. 1215, 839, 842–3, 1083, 1094–6, 1142, 1187–1199, 1150–1155, 1552, 1559, 1581, 888–891, 1586). Upon learning that these new employees had been hired, the Union's Shop Committee immediately protested that this hiring constituted a violation of clauses 1 and 10 of the 1938 contract (R. 237–238, 246–247; R. 467, 319–324, 651–3, 476, 498, 683, 889–891, 971–973, 1199–1201, 1418–1420, 1557–1559, 1567).

Plant Manager Schwartz replied that "management has seen fit to place these men, management has seen fit to keep them there" (R. 247; R. 467, 320, 653, 1200, 1207). President Rapport insisted that there was nothing to discuss, that there would be "no negotiations on interpretation of the contract," that "it [the hiring of the new men] was a problem of management", that whether the Union liked it or not the new employees would remain in the blanket department. Referring to the prior disputes with the Union he stated: "I did not accept anything; you forced me to. You know I had to sign all those contracts and I had to accept your contentions then because I wasn't prepared and

you was. This time it will be a different story" R. 247; R. 322, 332, 651–653, 970–972, 982, 1042–1043, 1200–1201, 1207).

In direct response to the hiring of the four men and Rapport's refusal to "discuss the matter further with our Shop Committee", the Union on that day petitioned its parent international for strike authorization, and on the following day, March 3, 1939, its members voted to strike (R. 248; R. 407, 470–474, 887, 1039–1042, 1543, 1557–1559, 1571–1580, 1773–1775, 1783, 1789, 1889–1897).

At a meeting on March 6, 1939, the Union's contention that petitioner had violated clauses 1 and 10 of the contract was rebuffed by petitioner's insistence that interpretation of the contract constituted a "matter of opinion" and that the "hiring of the four men" was a "question of management" concerning which the Union "had no right to negotiate" (R. 248–249; R. 474, 494, 324, 328, 655, 973). Petitioner asserted that, "We would like to manage the affairs * * * of the company" (R. 249; R. 1048–1049), and rejected a compromise offer advanced by the Union (R. 249; R. 325–328, 475–477, 495).

On March 10, 1939, when the Union announced to Rapport that it had received a strike authorization and requested him to reconsider, he reaffirmed petitioner's stand that this "question of management" could not be negotiated and that there would not be "any interpretation as far as the contract

was concerned" (R. 250; R. 330–332, 475–478, 1045–1047, 1052). Petitioner then rejected the Union's offer to withdraw from its prior position against the transfer of Levy to the blanket department (whom Rapport had previously sought to transfer to the blanket department) (R. 250–251; R. 334–334, 477–478, 658–659, 1213, *supra*, pp. 8–9). The Union instituted a strike that afternoon (R. 251; R. 478–479, 659).

On March 13, 1939, during the strike, petitioner began to hire new employees to take the place of the strikers (R. 251; R. 1224). On the same day, when the Union again insisted that petitioner had violated the contract, petitioner restated its refusal to "negotiate the matter", adding, "* * * we told these boys before they went out on strike and we tell them now that it is a strict prerogative of management, the placing and the hiring of men" (R. 251; R. 479–481, 335–336, 531, 898–899). Petitioner then refused to submit the issue to arbitration, as requested by the Union, on the ground that the matter at issue was one of "interpretation" and not "a matter for arbitration, which requires give and take" (R. 252; R. 901–902, 336, 531, 779).

On May 9, 1939, Local No. 120 unconditionally offered the return to work of all the strikers. Petitioner rejected the offer, indicating its willingness, however, to employ a small number of strikers, adding that it would not discharge any competent employees hired to replace the strikers (R. 252;

R. 1017–1022, 717–726, 746, 763–764, 756–757, 780–782, 984, 1399–1401, 1410).

Upon its review of the facts the Board found that petitioner had, in its dealings with the Union with respect to the hiring of the four men, maintained a "rigid predetermination" not to consider the Union's contentions (R. 255–256). The Board further found that respondent's lack of good faith in dealing with the Union and its leaders was reflected in its long-standing antipathy to the Union which had not abated in 1939 and in its treatment of the problem of transfers to the blanket department in October 1938 and January 1939 which, the Board found, constituted further evidence of petitioner's "ultimate unwillingness to deal with the blanket department except on its own terms" (R. 256). Accordingly, the Board found that petitioner had refused to bargain collectively in violation of Section 8 (1) and (5) of the Act (R. 257). The Board further found that petitioner's unfair labor practices had caused the strike of March 10, 1939, and that the strike was prolonged because petitioner continued to engage in these unfair labor practices and that petitioner's refusal to reinstate all of the strikers upon application by the Union on May 9, 1939, constituted a violation of Section 8 (1) and (3) of the Act (R. 260).

The Board's order required petitioner to cease and desist from its unfair labor practices; to bargain collectively upon request with the Union; to

offer reinstatement or placement upon a preferential remployment list to all of the strikers, except one, with back pay to all; and to post appropriate notices (R. 270–273).

On July 21, 1941, petitioner filed in the court below a petition to review and set aside the Board's order (R. 1–10). The Board answered, asking enforcement of its order (R. 28–32). On February 2, 1942, the court handed down its opinion (R. 2035–2050) and on May 8, 1942, entered its decree (R. 2070–2073) enforcing the Board's order and remanding to the Board that portion of the order referring to the matter of back pay for presentation to the Board by petitioner, within thirty days after the entry of the decree, of evidence of unjustifiable refusal by the strikers to take desirable new employment.[8] The court further ordered that upon

[8] Although the court below expressly noted (R. 2049–2050) that petitioner had failed to raise before the Board the issue of unjustifiable refusal by the discharged employees and the strikers to take desirable new employment, it nevertheless rejected the Board's contention that the question was raised too late and that a remand was improper. We believe that the court erred in ordering the remand. We also believe that the court erroneously rejected the Board's contention (R. 2063) that the scope of inquiry on remand be limited to the period between the date of the unfair labor practices and the date of the initial hearing. While we do not think that these errors are, under the circumstances of this case, of sufficient moment to warrant a petition for certiorari on behalf of the Board, we nevertheless reserve the liberty to raise the issue of tardiness of objection in defense of the decree below in the event that a writ of certiorari is granted to petitioner.

the failure of petitioner to present to the Board evidence of such unjustifiable refusal to take desirable new employment within the above-described time, the portions of the order dealing with back pay be forthwith enforced as written.

ARGUMENT

1. Petitioner's contention (Pet. 21–36) that the Board's finding that petitioner refused to bargain collectively is not supported by substantial evidence presents no question of general importance. In any event, the evidence summarized in the Statement (*supra,* pp. 3–15) affords abundant support for the challenged finding. That the court below did not, as petitioner contends (Pet. 2), apply an improper standard in considering whether there was support in the evidence for the Board's findings, is apparent on the face of the court's opinion. The court stated (R. 2036):

> The main question in this case, around which all others revolve, is whether or not there is substantial evidence to support the Board's order. It is axiomatic that upon such a question we do not try the case or weigh the evidence or pass upon the credibility of the witnesses in discharging our duty in these circumstances, we look only to the evidence that is favorable to the Board.

The standard of review adopted by the court was clearly proper. *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229;

National Labor Relations Board v. *Nevada Consolidated Copper Corp.*, No. 774, October Term, 1941, decided April 27, 1942.

Moreover, there is no conflict, as petitioner suggests (Pet. 32), with other cases decided by this Court. Petitioner's contention (Pet. 31–32) that, to allow the Board's finding to stand would be to compel the employer to make an agreement, and that the decision below enforcing the Board's findings is therefore in conflict with *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45, has no merit. The Board did not compel any agreement; it properly insisted that petitioner negotiate in good faith in an attempt to reach an accord concerning working conditions in the blanket department, a subject clearly within the proper scope of collective bargaining. Petitioner's refusal to bargain as to the true meaning of the existing contract (R. 256–257), as to which the Union had raised a substantial question, was based upon petitioner's arbitrary stand that employment in the blanket department was solely the concern of management.[9]

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[9] Petitioner also cites (Pet. 32) *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 549, and *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342. Both of these cases support the decision below; the former affirms the validity of the requirement that bargaining be in good faith under the analogous Railway Labor Act, while the latter holds that in addition to the requirement that employers bargain collectively with their employees to the end that

2. Petitioner contends (Pet. 16–21) that the collective labor agreement between petitioner and the Union constituted a contract of employment and that upon its expiration during the strike, the strikers lost their status as employees under Section 2 (3) of the Act. While we do not concede that the agreement of 1938 between petitioner and the Union created, or was intended to create, an employment relationship, it is clear that the employee status preserved under Section 2 (3) to those "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" is in no sense dependent upon whether the interrupted employment relationship is for a term or at will. Cf. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 219. Since no claim is, or can be, made that the employment status lapsed as a result of an effective discharge "for repudiation by the employe of his agreement" (*National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344) or for tortious conduct during the strike (*National Labor Relations*

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binding contracts be made, "the Act imposes upon the employer the further obligation to meet and bargain with his employes' representatives respecting proposed changes of an existing contract and also to discuss with them its true interpretation, if there is any doubt as to its meaning." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, to which petitioner also refers is not in point.

Board v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 254), the employee status of the strikers clearly remained intact. *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, 347; Sections 2 (3) and 13 of the Act.

3. Petitioner's contention (Pet. 38–40) that the strikers' application for reinstatement failed to place petitioner in default because it required that petitioner reemploy all of the strikers is without merit. Under well-established and uniform authority the strikers were entitled to demand their reinstatements as a group, even if that necessitated the discharge of all those hired after petitioner's unfair labor practices. *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875, 879 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, 871 (C. C. A. 2), certiorari denied, 304 U. S. 576; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 175 (C. C. A. 3), certiorari denied, 308 U. S. 605; *M. H. Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 437, (C. C. A. 7).

4. Equally without merit is petitioner's contention (Pet. 36–38) that the court below imposed an unlawful burden upon petitioner and infringed the discretionary authority of the Board by remanding the case to the Board for the presentation of evidence by petitioner concerning unjustifiable refusal

by the employees to take desirable new employment.

The remand of this issue was grounded upon the principle that the burden of presenting evidence is upon the employer (R. 2073). This was clearly proper. This Court has held in *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 198–202, that while the Board should order deductions from back pay on account of "clearly unjustifiable refusal to take desirable new employment" (313 U. S. at 199–200), this was in no sense a part of the Board's case but simply that "the employer should be allowed to go to proof on this issue" (*id.,* at 200).

Far from invading the discretion of the Board, the court below acquiesced in the Board's suggested procedure (R. 2063) and merely recognized the Board's "wide discretion to keep the present matter within reasonable grounds through flexible procedural devices" (*id.,* at 199). In any event, it is not open to petitioner to complain (Pet. 36–38) that the discretionary authority of the Board has been infringed. *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515, 558. See also *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, 697; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576.

CONCLUSION

The decision of the Circuit Court of Appeals enforcing the Board's order is correct. No conflict or other reason for further review of the order is presented. It is therefore respectfully submitted

that the petition for a writ of certiorari should be denied.

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National Labor Relations Board.

JULY, 1942.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449 (U. S. C., title 29 secs. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of

pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

SEC. 10. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

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(29)

No. 210

IN THE

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vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

HOMER CUMMINGS,
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Counsel for Petitioner.

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The brief of the Board in opposition serves merely to accentuate the serious errors in law of the court below.

I.

SECTION 2(3) OF THE NATIONAL LABOR RELATIONS ACT DOES NOT EXTEND THE EMPLOYEE STATUS BEYOND THE AGREED DATE OF TERMINATION OF THE EMPLOYMENT AGREEMENT

Important in the interpretation of the National Labor Relations Act and never decided by this Court is the ques-

tion whether § 2(3) of that Act has the affirmative effect of extending the employee status despite the happening of an event, other than a strike, which the employer and employee have agreed shall terminate that status. The Board apparently asserts that § 2(3) operates to continue the employee status beyond the date of termination of the contract of employment (Br. in Opp. 19-20).[1] The argument of the Board and the inapplicability of the cases cited by it conclusively demonstrate that there is here presented a question of great importance in the administration of the Act which has not yet been but should be decided by this Court. The only cases cited by the Board in support of its proposition are: *National Labor Board* v. *Mackay Co.*, 304 U. S. 333, 347; *National Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 219.[2] Those cases afford no support for the Board's contention that, despite the ending of the definite term of the employment contract, the employee relationship continued by virtue of § 2(3) of the Act. Indeed, they impliedly recognize that the Board's position is without merit.

The decision in the *Waterman S. S. Co.* case was ruled by the principle that the Act protects those who have a con-

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[1] In form the argument of the Board does not even meet the question involved. In essence it is (Br. in Opp. 19):

> The employee status preserved under Section 2(3) * * * is in no sense dependent upon whether the interrupted employment relationship is for a term or at will.

Petitioner has never argued to the contrary. The question is whether the employee status preserved under § 2(3) against termination by strike is by that section *extended beyond* the date fixed by the parties where "the interrupted employment relationship is for a term".

[2] It is unnecessary to consider the citation of *National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 344, and *National Labor Board* v. *Fansteel Corp.*, 306 U. S. 240, 254. It cannot seriously be argued that in those decisions there was any intimation that the causes of termination of the employee relationship there recognized were by this Court held to be exclusive.

tinuing tenure of employment, and that that employment depends on contract, express or implied. Contentions of the employer that "all tenure of employment and employment relationship of these men were at an end" (p. 211) was there rejected on evidence showing (1) that signing off or termination of statutory ship's articles did not terminate employment (pp. 213-217) and (2) a provision of the written union contract contemplated a continuing contract independent of such articles. No question of the effect of § 2(3) was there involved. Certainly, nothing in that case can be regarded as supporting the view that continuation of the employee status under § 2(3) of the Act is independent of the clear and specific agreement of the parties that employment shall be only for a fixed term ending on a definite date.

In *National Labor Board* v. *Mackay Co.*, 304 U. S. 333, this Court held that § 2(3) operates with § 8(3) to protect strikers against discriminatory refusal of reinstatement because of their union activities (pp. 346-347). But in that case the contention that the term of employment had ended was founded solely upon the fact of strike. The ruling, confined to denial of this narrow contention alone, and which the Board cites to support its argument, was (p. 347):

> The plain meaning of the Act is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employees for the remedial purposes specified in the Act.

Section 2(3) was there effective to preserve the employee status of the strikers against termination as a result of the strike.

But the language of the section does not purport, and this Court has never held that it is to be construed, to prevent the employment relation from ending at the time that the parties have agreed that it shall end. Indeed, this Court has expressly said in *National Labor Board* v. *Waterman S. S. Co.*, 309 U. S. 206, 218-219:

> The Act, as has been said, recognizes the employer's right to terminate employment for normal reasons. *National Labor Relations Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 45.

Expiration of the agreed term of employment is clearly a normal reason for termination of the employment status (Pet., p. 17).

The Union itself in this case recognized that the employee status ended with the expiration of the contract entered into in April, 1938 (1 R. 91-94). For at the time that it tendered a new contract (4 R. 1919-1929; 2 R. 706; 3 R. 1390) it asked a companion agreement that the petitioner "reemploy" the strikers (4 R. 1930).

It must be concluded that, as petitioner contends, on the date as of which the Board has ordered reinstatement, there was no contract of employment by which to determine the terms and conditions properly measuring the rights of the parties under the enforced new relationship. The employees had declared that they were unwilling to work for the old wages. After April 23, 1939, they were demanding higher wages and shorter hours. Since the old contract had expired, it would be equally as permissible to measure the wages under reinstatement by reference to the demanded contract as by reference to the extinct one. As a matter of law, neither could be used without in effect writing a contract for the parties.

II.

THE CIRCUIT COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT THERE WAS SUBSTANTIAL EVIDENCE TO SUSTAIN THE BOARD'S FINDING THAT PETITIONER REFUSED TO BARGAIN COLLECTIVELY

Not only is it clear that the court below approached the case upon an erroneous rule of review, but a consideration of the undisputed facts demonstrates that both the Board and the court below have relied upon inferences which are plainly contradicted by admitted facts.

A. The rule of decision announced by the court below is in conflict with the decisions of this Court and of other circuit courts of appeals.

The brief of the Board (p. 17) merely emphasizes and seeks to perpetuate the erroneous rule adopted by the court below (4 R. 2036):

> The main question in this case, around which all others revolve, is whether or not there is substantial evidence to support the Board's order. It is axiomatic that upon such a question we do not retry the case or weigh the evidence or pass upon the credibility of the witnesses. In discharging our duty in these circumstances, *we look only to the evidence that is favorable to the Board.* (Emphasis added.)

The Court by confining consideration exclusively to "the evidence that is favorable to the Board" thus closed its eyes to all but that part of the record upon which the Board relied and excluded from consideration numerous uncontradicted facts which, by their overwhelming and conclusive

nature, can leave no doubt in a reasonable mind that, contrary to the Board's finding, the petitioner did collectively bargain as required by § 8(5) of the Act.

Of course, this Court has never lent countenance to any such capricious doctrine as that laid down by the court and here sought to be sustained by the Board either in the cases cited by the Board (Br. in Opp., pp. 17-18) or in any other case. On the contrary, in *National Labor Board* v. *Columbian Co.*, 306 U. S. 292, 299-300, this Court has held that the substantive evidence required to support the finding of the Board upon review under § 10(c) of the Act

> must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

And in citing in the same case *Gunning* v. *Cooley*, 281 U. S. 90, 94, this Court in effect ruled that as an integral part of the same rule there is also applicable in review of the Board's findings the principle stated in that case (p. 94):

> Where the evidence upon any issue is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury. *People's Savings Bank* v. *Bates*, 120 U. S. 556, 562; *Southern Pacific Company* v. *Pool*, 160 U. S. 438, 440.

Obviously the application of the rule of substantial evidence requires an examination by the court, not confined "only to the evidence that is favorable to the Board" but "upon the whole case". *Southern Ry. Co.* v. *Walters*, 284 U. S. 190, 192; *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333, 340-341. In *National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342, this Court applied the rule that inferences based on testimony favorable to the Board lose weight and are reduced to less than a scintilla when considered in

the light of uncontradicted evidentiary facts favorable to the employer.

Conflict with other circuit courts of appeals is apparent from the decisions fully recognizing that in review of findings of the Board undisputed evidence disproving the allegations of the actor or qualifying other evidence so as to make it innocuous may not be arbitrarily rejected and disregarded and that application of the rule requiring substantial evidence necessitates that the whole of the evidence be examined. *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. 2d 13, 15 (C. C. A. 6); *National Labor R. Board* v. *Grower-Shipper V. Ass'n*, 122 F. 2d 368, 375-376 (C. C. A. 9); *National Labor Relations Board* v. *Tex-O-Kan F. Mill Co.*, 122 F. 2d 433, 438 et seq. (C. C. A. 5); *American Smelting & R. Co.* v. *National Labor R. Board*, 126 F. 2d 680, 687-688 (C. C. A. 8).

B. The court and board, because of their erroneous view of the law, have given effect to ill-founded inferences which are conclusively nullified by the overwhelming weight of undisputed facts.

As a result of the hiring of four men by the petitioner the shop committee asserted that the hiring was a violation of clauses 1 and 10 of the contract of employment (Br. in Opp., p. 12). As a result, the following conferences were held with representatives of the Company to discuss the matter:

1. A short conference of 10 minutes on March 2 with Schwartz, the factory manager, and Rapport, the President (1 R. 319-322, 467-469; 2 R. 652-654, 971-972; 3 R. 1199-1200).

2. An extended conference of 4 or 5 hours on March 6 (1 R. 248; 2 R. 974, 1044; 3 R. 1346-1362) attended by the five members of the shop committee and two representatives of the International Union (1 R. 529; 3 R. 1347)

and Rapport and two attorneys representing the petitioner (2 R. 973).

3. Two discussions with Rapport, the president of the Company, on March 10, the day of the strike, which terminated, not with a refusal by the Company to further discuss the matter but simply with a decision by the Union to strike upon rejection by him of the points of a compromise suggested by the shop committeemen (1 R. 330-332, 477-478; 2 R. 976, 1050-1052).

4. On March 13, a two-hour meeting in the office of a Department of Labor conciliator attended by the shop committeemen and company representatives (3 R. 1364-1368).

5. On March 16, 1939, another meeting in the conciliator's office (3 R. 1372-1375).

6. March 27, 1939, a meeting in the law office of the Company's attorney attended by the shop committee, a United States labor conciliator, and an assistant corporation counsel of the City of Chicago at which the Company was represented by Rapport and the Company's attorney (3 R. 1378-1379).

It, therefore, is clear that the Company was willing to, and did, discuss the matters of difference with the shop committee. But the Board holds (1 R. 256) that the Company

> did not enter into discussions with Local No. 120 concerning the interpretation of the 1938 contract with an "open fair mind". In sealing its mind in advance against the thought of entering into an agreement with Local No. 120 concerning the interpretation of the contract, the respondent did not fulfill its duty under the Act to bargain collectively * * *.

The series of factual bases stated and relied upon by the Board and the inferences by it drawn from them may be

stated seriatim and contrasted with the undisputed evidence destructive of the Board's case which, by reason of the lower court's misapprehension of the law, was disregarded by it:

1. The inferences of bad faith based on the ancient history of the employer-employee relationship are destroyed by the record facts which were not considered by the Board or court below.—Each of the inferences of the Board based upon the earlier labor relations of the Company are unsupportable.

a. In April, 1938, the directors and attorneys of the Company, together with Rapport, stated that clause 1 of the subsequently ratified contract was "a substitute clause for the closed shop" (1 R. 239). The Board's inference, apparently, is that a "substitute clause" is identical in effect with that for which it was substituted and, therefore, the substituted clause created a closed shop contract. But this inference, in itself of highly doubtful validity, must fail in the light of established facts. It is obvious from comparison of the Union's draft (4 R. 1814-1816) with the final form (1 R. 91) that this could not have been the intent of the parties. Not only is the phrase "shall join the Union" changed to "may join the Union" in the first clause, but the tenth clause of the draft providing expressly for a "closed union shop" was stricken entirely (1 R. 91-94; 4 R. 1814-1817).

b. The purpose of clause 10 was to give effect to seniority in making promotions (1 R. 239-240). The Board's implied inference is that this was a limitation on the management's right to hire new men (1 R. 253). The inference is plainly unjustified if words are to be given their plain and accepted meaning.

c. Rapport, in October, 1938, submitted to the shop committee a 10-point plan for future transfers to the blanket department. The shop committee accepted many of the points but submitted some counter-proposals. At a meeting held thereafter Rapport objected to the counter-proposal that the grievance committee should handle any dispute between the transferee and the foreman (4 R. 1808). There were no further negotiations and, according to the testimony of committeeman Moscato, quoted by the Board, the committee "didn't know whether it had been accepted or not" (1 R. 241-242). The innuendo is that the Company was remiss in failing to continue negotiations and that failure to agree at that time proves unwillingness of the employer to deal with the blanket department except on its own terms (1 R. 256). Indeed, in its brief in this Court the Board asserts (pp. 10-11):

> Petitioner failed to act upon the Union's suggested modifications of the plan and the entire project lapsed thereafter.

But the record without contradiction shows that Mr. Rapport, in the meeting to discuss the Union's counter-proposals, unequivocably rejected the counter-proposal which demanded that the grievance committee should have jurisdiction of any dispute as to whether the work of a transferee was satisfactory (2 R. 962-964). Under the law as declared by this Court an employer is not compelled to seek out his employees or request their participation in negotiations for purposes of collective bargaining; to warrant a finding of a refusal to bargain collectively it must appear that the employees proffered new offers of negotiations. *National Labor Board* v. *Columbian Co.*, 306 U. S. 292, 297-298. Moreover, as shown below, negotiations were reopened by Company representatives.

d. During January, 1939, the foremen initiated conferences with the shop committee in an attempt to make up a list of future transferees to the blanket department. The shop committee presented a list to which the foremen objected for lack of qualifications of several of those named. No agreement was reached "and no more conferences were held with a view to reaching an agreement" (1 R. 242). The inference of the Board is that it became the duty of the Company to suggest a counter-list and its failure so to do is evidence of unwillingness on the part of the Company to deal as to the blanket department except on its own terms (1 R. 256). This inference is based upon an incomplete statement of the facts. The following *uncontradicted* and additional facts destroy the inference:

The Union submitted a list of 12 men whom it wanted transferred (4 R. 1809). Many of the men on the list were palpably unfitted for work in the blanket department. The shop committee recognized this by withdrawing Collins and Anthony, two colored janitors (2 R. 656; 4 R. 1541; 3 R. 1117, 1079); the name of Wagner on the list was passed (3 R. 1109) because he was a former employee of the blanket department who had been discharged for repeated tardiness and trouble making (4 R. 1631-1634, 1616-1620) and had later been given a job in another department (3 R. 1469). It was found that Krueger did not want to be transferred (3 R. 1108, 1136, 1242). Revica and Perille, two men doing the low grade work of strippers of rollers and truck unloaders (1 R. 97; 3 R. 1240-1241), were considered "dumbbells" (3 R. 1107-1108, 1240-1241, 1121-1122). Guinta was unwilling to be transferred because he was making more in another department (3 R. 1242). The Company was willing to take two men on the list, Paull and Pieracci (3 R. 1105-1108, 1240-1241, 1086-1087), but the shop committee would not consent to their being transferred unless men of greater

seniority were first transferred (3 R. 1241, 1086, 1106-1107, 1118, 1121-1122). Frazatella, Lawrence and Dulski were not offered by the Union after Revica and Perille were rejected. It was the Union's obstinacy that prevented the transfer of Paull and Pieracci, two men on their own list. After that impasse the Union promised to submit another list at a meeting to be held in three or four days (3 R. 1122, 1123, 1557) but this list was never prepared. A shop committeeman informed foreman Peters that there would be no further meeting until Schwartz, the factory manager, returned because "the committee and the superintendents can't come to any agreement of which men should be transferred to the blanket department" (3 R. 1124).

e. The Board next cites the fact that Schwartz, the factory manager, from that time until he hired the four men did not consult with the shop committeemen to ask them for their own final proposals (1 R. 242-243). The apparent inference is that the Company either on principle or by implied agreement sustained a duty to take the first step forward and that it failed to do so. Assuming, without conceding, that there was such a burden, the uncontradicted evidence shows that after Schwartz returned from his vacation foreman Peters again asked shop-committeeman Meyers about the meeting they were to have after Schwartz returned and was rebuffed by Meyers who said (3 R. 1124):

> There isn't going to be any more meetings to be discussed because we can't get to—because we can't get to no agreements. Just forget about any more meetings.

Meyers, although subsequently called back for rebuttal failed to contradict this testimony in any respect (4 R. 1570). Plainly the Company did all that it could be held bound to do in seeking to obtain an amicable settlement of the question of transfers to the blanket department. To

say, as the Board does, that the Company's conduct at that time was evidence of its unwillingness to deal as to the blanket department except on its own terms is to subvert the principles of fair hearing which include not only the right to present evidence but the right to have it considered. *Chicago Junction Case,* 264 U. S. 258, 265; *Morgan* v. *United States,* 298 U. S. 468, 480-481; *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 356-357.

f. The Board held (1 R. 246):

> Rapport's continuing anti-union attitude, as evidenced by [his] remarks, must be considered in evaluating Local No. 120's contention that the respondent thereafter refused to bargain collectively with it concerning the hiring of the four men.

Thus the Board resorted to the universally condemned practice of piling inference upon inference to reach its ultimate finding of lack of good faith. The first is the inference that Rapport was anti-union—an inference in itself of questionable validity since his statements and conduct are equally susceptible of interpretation that he recognized that he would have to deal with the Union and was quite willing to do so but that, appreciating this fact, he endeavored so far as possible to preserve in the management certain rights which he deemed indispensable to the function of management. Furthermore, this initial inference of the Board was reached only by avowedly disregarding the following uncontroverted facts in favor of the employer which overwhelmingly negative the validity of the conjectural inferences of the Board:

(1) The Company recognized Local 120 as soon as it was formed. Immediately upon its formation the company entered into negotiations with it (2 R. 943-944) which led to a binding contract for the following year (1 R. 100, 301-302; 4 R. 1802-1805). At the expiration of that year

it made a new contract, which was in force at the time of the difference in March, 1939 (See Pet., pp. 8-9, and footnote 4).

(2) Every production worker was a member of the Union; the plant was one hundred per cent organized at all times after the establishment of the Union (2 R. 870-871; 944; 3 R. 1198-1199; 4 R. 1891).

(3) On every occasion on which the Union representatives desired a hearing the employer received its representatives and dealt with them as representing all its production employees.

(4) In the two years in which the Union had operated there was never any disagreement concerning wages, hours, or working conditions. Every complaint on these subjects was satisfactorily adjusted after due bargaining with the representatives of the labor organization (1 R. 233, 237, 273; 2 R. 957-958; 3 R. 1183, 1226-1227).

(5) The employer had a long and enviable record of good labor relations; it furnished its men an extremely fine plant to work in, with individual lockers, showers and unusual cleanliness in every part of the factory (4 R. 1644); no employee was ever discharged during the Union relationship; for a time long before the unionization there was scarcely any change in the production staff, and this was pronounced by a representative of the national organization a remarkably creditable record as to labor turnover (2 R. 915); the Company paid wages higher than were paid by its competitors (2 R. 866; 3 R. 1323, 1330).

(6) On the only disputes which arose after the organization of the Union and prior to March, 1939, the Company had yielded one hundred per cent to the Union demands (Pet., 22-23).

(7) The Union fully recognized the satisfactory attitude of the management by writing to the parent organization on March 2, 1939, "We have never had any trouble with the management in the two years we have been organized with the exception of a successful (quickie) several months ago" (4 R. 1891); this exception was a reference to the Levy incident, one of those on which the employer completely yielded to the Union. The Union in another and subsequent communication spoke of its past relations with the employer as "amicable" (4 R. 1933).

(8) Shortly after the Union expressed a desire to have men from other departments transferred to the blanket department, the Company voluntarily entered upon months of conferences by way of endeavor to work out an agreement with the shop committee on a system of transfers from one department to another (2 R. 894; 3 R. 1085-1087, 1102, 1105-1106, 1117-1122, 1124, 1213-1214, 1240; 4 R. 1806-1807).

Upon its threadbare inference of anti-union attitude on the part of Rapport, the Board, however, confessedly piles the further inference, even more unfounded, that the Company did not thereafter discuss the controversy in good faith. Aside from the inherent vice of piling inference on inference, this course of reasoning ignores the fact that in its lengthy discussions with the shop committee the Company was represented by its attorneys, both of whom were directors of the Company and one of whom was also a vice president (2 R. 849; 3 R. 1322). Plainly, the ultimate and exclusive control of the matter was not in Rapport's hands. Therefore in assuming an anti-union attitude on the part of Rapport and in concluding that such attitude must control in evaluating the contention that the Company refused to bargain collectively, the Board and the court gave effect

to mere suspicions which are controverted by the established facts.

The main reason why those ancient acts cited by the Board have no relevance is that they have nothing to do with the question of collective bargaining. They all relate to the issue of coercion and restraint. They are immaterial even on that issue because they never influenced a single employee. Every one of the employees joined the Union. None ever resigned from it. Rapport's remarks critical of unions never had any effect on anyone.

As an excuse for adducing those totally irrelevant statements of Rapport, the Board in its brief (footnote 4 on page 9) says that those ancient incidents form part of the "totality of the Company's activities during the period in question." They did not. The period under investigation was in March, 1939, and thereafter. The incidents referred to took place long before. There is no reason to believe that the Company continued to have in March, 1939, the distrust of unions which it had in March, 1937, at the time of the wave of sitdown strikes throughout the country. In all other relations of life, the law respects the principle of *locus poenitentiae*. From contact and experience the Company had learned in 1939 that there was nothing objectionable about unions. When the four new men were hired a few days before the strike of March 10, 1939, the Company encouraged them to join the Union (4 R. 1581; 2 R. 840; 3 R. 1198-1199, 1142-1143).

But even if it were true that certain officers of petitioner continued to have in March, 1939, a dislike of certain Union men, or of the dictatorial methods of some of the members of the shop committee, such a fact has no bearing on the question whether the Company did actually in good faith discuss the contract interpretation differences which arose in 1939. That it did so is undisputed. The

tenuous inferences of the Board cannot stand in the face of direct and undisputed testimony of facts.

2. **The inferences of bad faith based on statements made at the time of the discussions arise from a disregard of the surrounding circumstances and are rebutted by them.**— The matter as to which it is claimed the employer refused to bargain was not a dispute over wages, hours, or working conditions; it was not over the reinstatement of any employee, because no one had been discharged; it did not involve any conflict between labor organizations. Neither was there any suggestion of a desire by the Union to execute a new contract or to negotiate an amendment to the existing agreement.

The dispute was wholly and solely over the assertion by the Union that *under the existing contract* of employment it had a right to dictate whether new employees should be hired and to what work they should be assigned.

a. The Company has always recognized that under the Act it is required to discuss with the shop committee contract interpretations suggested by the latter.—The term, "bargain collectively", as used in the Act is not, in its primary meaning, suitable to describe the process of a conference directed toward composing or eliminating a difference over the interpretation of a contract. When the courts have applied the requirement of collective bargaining to dealings addressed to forming the terms of a new contract, they have often used the word "*negotiate*" as synonymous with bargaining collectively. In such a situation the parties *are* negotiating. The process of negotiation of contract terms involves barter and give and take. But when an ethical party is contending for a given interpretation of a contract he does not employ the methods of bartering. He depends on facts and arguments. He

does not trade. He *discusses*. The duty to "bargain collectively" which the employer owed the employees with reference to the disputed interpretation of the contract is a duty "to *discuss* with them its true interpretation if there is any doubt as to its meaning" (*National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 342). The Company did so, as set forth in the Petition, in the text above, and as recognized by Board Member Leiserson in his dissent (1 R. 273).

b. *The shop committee's assertion that "negotiation" with respect to the hiring of new employees was required was based not on the statute but solely upon the contract of employment.*—The disputed rights of the employer and the Union in the selection and assignment of new employees depended entirely upon the terms of the subsisting contract, because even the shop committee recognized that the selecting and assigning of new employees were privileges of the management in the absence of contract provisions to the contrary. However, the shop committeemen contended that the terms of the contract in force gave them a voice and a veto in such selecting and assigning of new employees.

That the contract did not give the Union the rights claimed is not debatable. The Board has never attempted to set forth any reasons in support of the Union's interpretation claims. There are none. But the Union contended it had such contract rights. The employer had never denied that the Union had a right to discuss with the employer its claims as to the meaning of the contract and to have from the employer a statement of the employer's reasons why the Union's interpretations of the contract are untenable. The employer undertook to state to the Union representatives its reasons for rejection of the employees' contract interpretations. But the very statement of the Company's reasons in support of its sound interpretation has been

distorted into a declaration of a refusal to bargain. That distortion has a certain superficial plausibility by reason of a confusion with respect to different meanings of the word "negotiate" and with respect to the character of the dispute about which the law required the parties to "bargain", as set forth in the next paragraph.

c. *Rapport's so-called refusal to "negotiate" was a mere denial of existence of the Union's asserted contract right of voice and veto in hiring.*—Here the Union was not seeking to enforce its statutory right to collectively bargain or negotiate for a contract of employment or an amendment of the existing agreement. The bargain had been made. The committee was merely contending for recognition by the Company of the right asserted by the Union to a voice and veto in the hiring and assignment of men *under the existing contract.* The shop committeemen claimed that the Company's violation of the contract consisted of depriving the Union of those asserted *contract* rights to negotiate with the management before the four new men were hired and assigned. Rapport denied that *the contract* gave the employees any such right to negotiate with the employer as to what new employees should be hired or as to the work to which the new employees should be assigned (See Pet., pp. 25, 34-35).

In this case the employees were uneducated or little-educated men. Rapport was likewise not an educated man. He did not have an understanding of shades of meaning of words of Latin derivation. His concepts of the meaning of "arbitration" and of "personnel" were hazy and inaccurate (2 R. 1049-1050, 1053). The shop committeemen were as loose as Rapport in the use of the words "negotiate" and "arbitrate". Both the committeemen and Rapport used the words "negotiate" and "negotiation" to describe the claimed duty involved in the contract interpretation dispute. The men claimed that *the contract* gave the Union

a right to negotiate with the Company in the determination of what new employees should be engaged and of what work they should be assigned. Thus, when the men claimed that *under the contract* the ordinary function of management had been changed so as to give the men the right to negotiate over the hiring and assignment of new employees, and when Rapport said they had no right to "negotiate" such matters, the language was directed merely to a statement of the difference over the rights granted in the contract provisions.

d. *Rapport's denial of the Union's interpreted contractual right of "negotiation" had no relevance as to his intent to conform to the statutory duty of the Company to discuss the contention.*—It is absurd to say that the language of Rapport referred to at pages 12 and 13 of the Board's brief was a declaration of a refusal to bargain collectively—of a refusal to discuss the true interpretation of the contract provisions. The absurdity of such a contention is manifest from the fact that, at the very time some of those statements were being made in the meeting of March 6th, the employer, by its officers and its lawyers, *was* conferring, *was* discussing, and *was* trying to compose the difference of interpretation. On that occasion the officers and lawyers on behalf of the Company were actually stating and explaining the reasons for their interpretation of the contract and were genuinely endeavoring to persuade the Union representatives that they had no basis for their interpretation (see Pet., pp. 25-27, 30-31, 33-34). The undisputed evidence discloses that the Company was then doing precisely what this Court in the *Sands Manufacturing Company* case said was the measure of the employer's duty under the collective bargaining requirement, namely, to discuss with the employees the contract's true interpretation. As soon as the Union asked

for a meeting to discuss their claim that the hiring of the four new men was in violation of the contract, a meeting (that of March 6th) was held between the Union representatives, including representatives of the national organization (1 R. 248; 3 R. 1347), on the one hand, and three directors of the Company, including the president and the vice president on the other (Pet., pp. 25-27, 31-35).

From statements of Rapport and others that hiring of men was not a matter for negotiation and that there would be "no interpretation of the contract", the Board concludes not that the Company did not negotiate—for the evidence is ample that it did discuss the differences with the shop committee—but that it "did not enter into the discussion with Local No. 120 concerning the interpretation of the 1938 contract with 'an open and fair mind' " (1 R. 256). Since this decisive conclusion of ultimate fact is based on inferences from the language purportedly used it was obviously essential to consider the circumstances in which the alleged statements were made and with regard to the precise contentions to which they were addressed as answers.

With respect to the meetings between the Company and Union representatives, the Board and the court laid heavy emphasis on two types of statements made by Rapport: (1) That the newly hired men were going to remain in the blanket department, that he had had to accept the shop committee's contentions before but this time he was prepared; and (2) that he would not "negotiate" (1 R. 246-250, 255; 4 R. 2042-2044).

The first type of statement was nothing more than a strong statement of the Company's position and a warning that it was in a better economic position to withstand a strike if it should come to that. Nothing in the law commands an employer to desist from vigorous and positive arguments; the law does not require the employer always

to surrender his rights. This Court has repeatedly recognized that the employer may remain firm in his position and, without violating the law, refuse entirely to make a collective contract. *National Labor Board* v. *Jones & Laughlin Corp.*, 301 U. S. 1, 45; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 549, 557 note; *National Labor Board* v. *Mackay Co.*, 304 U. S. 333, 345-346; *National Labor Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343, 344. *A fortiori*, the employer, in bargaining, may be equally firm in stating his reasons and grounds and in asserting his position.

As to the second type, the statements that there would be no "negotiation," that the committee "had no right" to negotiate concerning the hiring of the four men (1 R. 255) and that there would be "no negotiations on interpretation of the contract" (Br. in Opp., p. 12), it is plain that regard must be had to the precise nature of the demand that the shop committee was making. The committee claimed that *under their interpretation of the employment contract*, before hiring of new men by the Company, a reference was required to be made to the committee and thereupon the committee under this same interpretation had the right to finally determine whether the men should be hired, regardless of their willingness to join the Union, and the further right, if they were hired, to determine the department to which they should be assigned. The shop committee apparently regarded these privileges as constituting a right to "negotiate" with the Company with respect to the hiring of men. There is no evidence whatever, substantial or otherwise, that Rapport or any other representative of the Company said on March 2nd, or at any other time prior to the conference of March 6th, that the Company would not negotiate on the interpretation of the contract. The only evidence with respect to such language is in the testimony of Nielson, who was testifying about the compromise proposal of Moore that the Union

name two men and the Company name two men for work in the blanket department (1 R. 328). That proposal was made near the close of the long conference of March 6th and after the contract interpretation matter had been extensively discussed and after the committee's interpretation had been conclusively refuted in argument (2 R. 655, 896; 3 R. 1360-1361; 1 R. 475-476; and see record references, Pet., 26-27). After Nielson had testified about the Moore proposal he was asked what the Company's answer to it was. He testified: "They said the hiring of those men is a question of management, that we have told you that before, [and] that there will be no negotiations on interpretation of the contract" (1 R. 328). In view of the facts that the interpretation question had been fully discussed and that the employer had by argument established that the committee's interpretation was untenable, the statement, if then or thereafter made, meant merely that it was useless to discuss that interpretation question further. If made, the statement indicated simply that the company officials did not and would not, after the discussion which had been had, recognize any such claimed right under the existing contract (see Pet., pp. 24, 34-35). It is highly important to note that the only testimony with respect to that statement is that it was made after the Company had discussed at length the interpretation of the contract.

Properly understood and taken in context, these expressions amounted to no more than affirmations that (1) under the contract there was no right in the Union to veto applicants hired by the Company and (2) that the Company intended not to yield and agree to any purported "interpretation" of the existing contract which would so seriously invade the sphere of management.

The Board (1 R. 247) first refers to statements of Schwartz that "management has seen fit to place these men, management has seen fit to keep them there." This

was obviously a mere statement of the ordinary management right to hire men (1 R. 467). The Board next refers (1 R. 247) to Rapport's entrance at the time the shop committee first voiced its complaint to Schwartz, and to the shop committee's statement (2 R. 972):

> we got seniority right situation here we want to discuss

and to Rapport's answer:

> I don't think there is anything to discuss, everybody is working, we hired some additional men, that is all there is.

Certainly no fault can be found with this answer to a contention so ill-founded.

The Board also refers to alleged further statements of Rapport at the same short meeting on March 2 (1 R. 247) which when read in context disclose nothing more than adherence to his position that nothing *in the contract* required the employer to treat or "negotiate" with the committee for permission to hire men. He merely asserted the independent right to hire men and a purpose not to accede to any so-called "interpretation" of the contract terms which plainly granted no such veto power to the Union (1 R. 321). The Board insists on treating this statement as an expression of intent not to discuss the matter of the alleged interpretation with the employees as required by the Act and as showing lack of good faith. This is in entire disregard of the facts of record.

At the meeting on March 6, which lasted about five hours, every argument of the Union was listened to and answered. Every question in dispute was discussed at length. In the discussion the Union claims of contract interpretation were shown to be erroneous on every point (Pet., pp. 25-27). The discussion established that the supposed grievance of the employees was on a matter of very little consequence

and it was so characterized by the chief representative of the national union organization present at the negotiation (1 R. 474; 2 R. 1044; 3 R. 1348). On every point of difference discussed at the meeting, the Union was wholly without valid reason. The sole complaint of the Union reduced itself to a claim of violation of the contract. There was not the slightest basis for a charge that the terms of the contract had been violated. The Board has adduced no argument in support of the Union's preposterous interpretation. When the shop committee began to doubt, as its ablest member described it, "whether it had any legal legs to stand on" (4 R. 1774), the Union interjected into the situation demands for the discharge of Schrambeck. The Union threatened drastic action, meaning a strike, unless Schrambeck was discharged (4 R. 1915, 1917); it is now apparently conceded the employer was under no duty to comply with that demand to discharge Schrambeck. A fair reading of the testimony of the witnesses to which the Board in its brief, p. 13, cites, can leave no reasonable doubt that Rapport was merely constantly reaffirming his position that under the contract the Committee had no right to "negotiate" as to the hiring of men (See 1 R. 324, 328; 2 R. 655, 973).

It is apparent that the error of the court below is not confined to a mere statement of an erroneous rule of law. Pursuant thereto it has in fact erroneously ignored all evidence favorable to petitioner. The error, of course, has been extremely prejudicial to petitioner because, as shown above, most of the factual evidence so disregarded directly and conclusively rebuts the inference upon which the Board's ultimate finding of failure to bargain is based.

The rule established as applicable by this Court (*Gunning* v. *Cooley*, 281 U. S. 90, 94; *National Labor Board* v. *Columbian Co.*, 306 U. S. 292, 299-300) is:

> this court assumes that the evidence for the opposing party [the Board] proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.

This has been perverted by the court below into the rule announced by it (4 R. 2036):

> In discharging our duty in these circumstances, we look only to the evidence that is favorable to the Board.

The Board professes to see no distinction between the two rules and persists in treating them as identical (Br. in Opp., p. 17). The question of the scope of review of decisions of the National Labor Relations Board is of manifest general importance. Because the court below has decided this important question of Federal law in a way clearly in conflict with the decisions of other circuit courts of appeals and of this Court, it is submitted that review by this Court is imperative.

III.

THE STRIKERS MADE NO OFFER TO CEASE STRIKING AND RETURN TO WORK

In the Petition, pp. 38-40, it is pointed out that the alleged offer of the striker to return to work, upon which the requirement of back pay contained in the Board's order (1 R. 265-266, 271-272) and the Court's decree (4 R. 2072) was based, was not a simple offer to return to work at all. The offer of the Union was modified and hedged about with conditions which required that the Company yield on all the points of dispute which were the occasion for the strike.[3]

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[3] The Board's brief (pp. 14-15) cites copiously in purported support of the proposition that "On May 9, 1939, Local No. 120 unconditionally offered the return to work of all the strikers." Reference to the cited record pages indicates the lack of foundation for the Board's finding

The Board's brief (p. 20) misstates and fails to meet petitioner's contention, asserting that the Company's objection to the efficacy of the offer is grounded merely on the Union's condition that "petitioner reemploy all the strikers". As pointed out in the Petition (p. 39), the objection to the form of the offer to return to work is not that it was a group offer but that—

> the strikers offered to returned to work if all their demands, which are alleged to have occasioned the strike, were first met. It was not an offer to cease striking and return to work, but a demand that the Company surrender and capitulate on every point.

The fundamental absurdity of the Board's order and the Court's approval is apparent. For under the rule thus established, strikers can place the employer in default if, after calling a strike to enforce their demands, they make an offer to return to work conditioned upon the granting of all the demands whose denial was the occasion for the strike. That is exactly the situation in this case and the Board has failed in any way to meet the point.

(1 R. 252). The first citation, "R. 1017-1022," fails to show what was meant by the Union's requirement that all striking employees come back in a group. While the second citation, "R. 717-726," might possibly be regarded as an implied unconditional offer, other testimony not in conflict therewith, and hereinafter referred to, shows that that was not unconditional. Other citations are to meetings on other dates, either before or after May 9, the date fixed upon by the Board: "R. 746" relates to June 26, 1939; "R. 763-764" refers to June 28; "R. 756-757" refers to April 21 (See R. 754), and on that date the Union was apparently insisting on return only under the terms of the Union's new draft of contract of employment for the year commencing in April, 1939, including clause 8 (R. 1921) which required discharge of non-union employees on Union request (R. 755-758). The next reference ("R. 780-782") relates to March 16. At "R. 984" there is nothing to show an unconditional offer. The last two citations by the Board ("R. 1399-1401, 1410") sustain petitioner's assertion that the Union's offer to return was conditioned on discharge of all non-union employees, including those whose hiring had first occasioned the dispute. The condition of the offer thus required recognition of the Union's asserted right to veto hirings which was the very matter in dispute ("R. 1399-1401, 1410").

IV.

THE TERMS OF THE REMAND OF THE CASE WITH INSTRUCTIONS TO DETERMINE DEDUCTIONS FROM BACK PAY IMPOSE AN UNLAWFUL BURDEN UPON PETITIONER AND ARE PROPERLY QUESTIONED BY PETITIONER

To petitioner's contention that "it is for the Board to determine the theory upon which it will proceed * * * and then to present its evidence and formulate its modification of the order" on the issue of deductions from back pay (Pet., p. 37), the Board answers that "this was in no sense a part of the Board's case" (Br. 21). In short, the Board takes the position that this is an ordinary suit at law or in equity in which the respondent must proceed, with reference to deductions, as though it were a counterclaim or set-off in private judicial proceedings. But this Court has recently and repeatedly denied that Board proceedings are of that nature:

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * It has few of the indicia of a private litigation * * * The Board acts in a public capacity to give effect to the declared public policy of the Act. (*National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 362.)

> Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. (*Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 188.)

> A statute expressive of such large public policy * * * must be broadly phrased and necessarily carries with it the task of administrative application. *Id.*, at 194.

> The power with which Congress invested the Board implied responsibility—the responsibility of exercising its judgment in employing the statutory powers. *Id.*, at 194.

And, with particular reference to the determination of deductions for back pay, this Court has said that "the remedy of back pay * * * is entrusted to the Board's discretion; it is not mechanically compelled by the Act" (*id.*, at 198); "in applying its authority over back pay matters, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations" (*id.*, at 198); and the period to be covered by such deductions as well as procedural variations lie within the Board's discretion (*id.*, at 198-199, note 7). When this Court said that "the employer should be allowed to go to proof on this issue" (*id.*, at 200) it meant no more than that, upon and in any proceeding framed and conducted by the Board for the making of the record, the employer should be entitled to participate, cross examine, offer rebuttal, and present evidence. Such a proceeding is a far cry from the Board's present demand that the employer assume the initiative, frame proceedings as for a counterclaim, and present proof thereon.

Upon the same authorities, and by the same token, the Board's contention that "it is not open to petitioner to complain" (Br. 21) is ill founded. These are proceedings of a peculiarly public and administrative character, as set forth above. Petitioner, like any other party to Board proceedings, is entitled to insist that the Board perform its statutory function in applying a remedy directly affecting the petitioner. It is an executive, as distinguished from adjudicating, function of the Board to frame and initiate the proceeding and then to make a record on the subject of

deductions for back pay. Petitioner does not complain of the infringement of other parties' rights, to which the Board confines its citations (Br. 21), but of the failure of the Board as an administrative agency to perform its public function and of the attempt to shift the whole burden of initiative and proof to petitioner.

CONCLUSION

Because of the errors of law in the decision of the court below, which are not only highly prejudicial to the petitioner but plainly create a conflict with the decisions of this Court, it is submitted that writ of certiorari should be granted.

Respectfully,

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